83 - 1656

No.

In the Supreme Court of the United States

October Term, 1983

BERTOLD J. PEMBAUR,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

Upon proof that the physician-owner of a private medical clinic resisted a warrantless police entry into the clinic by refusing to open a door between the clinic's public reception area and its inner offices, does conviction of the physician-owner on a charge of Obstructing Official Business (Ohio Rev. Code § 2921.31(A)) violate the due process clause of the Fourteenth Amendment?

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Petitioner, Bertold J. Pembaur, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio rendered on February 8, 1984, in *State v. Pembaur*, 9 Ohio St. 3d 136, 459 N.E.2d 217 (1984). That judgment reinstated a conviction on a charge of Obstructing Official Business (Ohio Rev. Code § 2921.31) which had previously been reversed by a state court of appeals.

OPINIONS BELOW

Petitioner was convicted in the Common Pleas Court of Hamilton County, Ohio, of violating Section 2921.31(A) of the Ohio Revised Code (Obstructing Official Business) (App. p. A82). In an unpublished opinion rendered on February 18, 1981, the Court of Appeals for Hamilton County, Ohio, reversed Petitioner's conviction and ordered his discharge (App. pp. A38-A82). The State applied for reconsideration, challenging the composition of the

three-judge panel that decided the case. The application for reconsideration was denied (App. pp. A34-A35).

The Supreme Court of Ohio, on February 3, 1982, approved the State's challenge to the composition of the three-judge panel which had reversed Petitioner's conviction, reversed the decision of that panel, and remanded the case to the Hamilton County Court of Appeals for rehearing. *State v. Pembaur*, 69 Ohio St. 2d 110, 430 N.E.2d 1331 (1982) (App. pp. A28-A30).

Upon rehearing, a second and different three-judge appellate panel, in an unpublished opinion rendered on November 3, 1982, again reversed Petitioner's conviction and ordered his discharge (App. pp. A9-A27).

The State appealed a second time to the Supreme Court of Ohio. On February 8, 1984, that Court, in *State v. Pembaur*, 9 Ohio St. 3d 136, 459 N.E.2d 217 (1984), again reversed the judgment of the court of appeals and ordered Petitioner's conviction reinstated (App. pp. A1-A6).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 8, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section One of the Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2921.31 of the Ohio Revised Code provides:

> (A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.
>
> (B) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Section 2921.01(L) of the Ohio Revised Code provides:

> As used in the Revised Code:
>
> • • •
>
> (L) "Privilege" means an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity.

Section 2317.21 of the Ohio Revised Code provides:

> When a witness, except a witness who has demanded and has not been paid his traveling fees and fee for one day's attendance when a subpoena is served upon him, as authorized by the provisions of section 2317.18 of the Revised Code, fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, a writ of attachment, commanding him to arrest and bring the person named in the writ before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. If such writ does not require the witness to be immediately brought, he may give bond for a sum fixed by the court of common pleas or the court which issued the subpoena, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum is so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why such writ should not issue against him.

STATEMENT OF THE CASE

A. The State's Case—Proof of Obstructing Official Business

On June 24, 1977, Dr. Bertold J. Pembaur, a licensed physician and the director and proprietor of the Rockdale Medical Center in Cincinnati, Ohio, was charged in a six-count indictment filed in the Common Pleas Court of Hamilton County, Ohio.

Over defense objection and upon request of the State, the trial court severed the sixth count of the indictment, and ordered that trial on that count precede trial on the remaining charges. Count six alleged that Dr. Pembaur

> "* * * without privilege to do so, and with purpose to prevent, obstruct or delay the performance by David Allen and Frank Webb, public officials, of an authorized act within their official capacity, committed an act which hampered or impeded the said David Allen and Frank Webb in the performance of their lawful duties, in violation of Section 2921.31 of the Ohio Revised Code * * *."

At trial the State presented proof that, on May 19, 1977, two capiases issued authorizing the seizure of Dr. Kevin Maldon and Marjorie McKinley—employees of the Rockdale Medical Center. The capiases recited that Maldon and McKinley had failed to respond to grand jury subpoenas (R. 321-25).

With the capiases in their possession, Deputies Allen and Webb went to the Rockdale Medical Center. Both were in civilian dress. They entered the Center without interference. They observed what they described as "a normal reception area for a doctor's office" (R. 326), with a door leading from the reception area to the inner office. One of the deputies described what happened next:

> "I heard David [Allen] say, 'I'm a policeman. I want to see Mrs. McKinley.' And about that time David turned and went around to the side, to the door going into the office. I got up and followed him around.
>
> At that time Dave was standing in the door, pushed against the door, and a black girl in nurse's

uniform was standing inside the door saying, 'You can't come in. You can't come in.' And as I walked up Davie had both hands up on the door. I took my billfold out and showed her my identification and put it back in my pocket and we attempted to push the door. And she said, 'Wait for the doctor.'

So when she said, 'Wait for the doctor,' I turned and went back around to the window and about that time I saw a man, whom we found out later was Dr. Pembaur, come walking down the hall and as he got to the black girl at the door he and the black girl slammed the door closed. He reached down and got the board and wedged it down in the door.

I ran back around and we attempted to shove the door, but we couldn't budge it." (R. 327.)

The deputies then told Dr. Pembaur that they wanted "to see Mrs. McKinley." (R. 328). Dr. Pembaur instructed the deputies to leave, and warned that if they did not do so he would call the police. The deputies refused to leave, and the police were called (R. 329-31). After the police arrived, Dr. Pembaur was, for the first time, shown the capiases in the possession of the deputies (R. 335). According to one of the officers on the scene, Dr. Pembaur then said, "Let me talk to my lawer. If he says I should let you in, I will let you in." (R. 455).

A State witness testified that Dr. Pembaur attempted to contact four different attorneys (R. 534-35). One was called approximately ten times (R. 631). Dr. Pembaur also attempted to obtain advice from two different judges (R. 372, 551-52, 581). All efforts to contact lawyers and/or judges were futile. While the attempts were made, Dr. Pembaur served tea to the waiting officers (R. 371).

Approximately two hours after the deputies arrived, with police officers and numerous media representatives on the scene, the door between the reception area and the inner portion of the clinic was smashed with an ax and a sledgehammer. The officers then entered (R. 342).

B. The Defendant's Contention—The Constitutional Right to Refuse a Warrantless Entry

Before the first witness was sworn at trial, defense counsel requested a ruling that the charge of Obstructing Official Business could not be sustained by proof that Dr. Pembaur refused to permit a warrantless entry into his clinic. The defense contended that the refusal to permit a warrantless entry is not a crime nor evidence of a crime, and that a citizen is constitutionally privileged to resist a warrantless entry by simply refusing to open a door (R. 271-84). The trial court responded:

> "[T]he motion to determine 'without privilege to do so'—I said the privilege for which you argued yesterday the Court determines that Dr. Pembaur did not have the privilege at that time. Privilege is not extended to him for the date on which the deputies attempted to serve their process, and Dr. Pembaur was not operating under the privilege and the privilege was not extended to him." (R. 299.)

The trial court prohibited proof or argument that the capiases which the officers sought to execute on May 19, 1977, had been illegally issued, that the recitals contained in the capiases were untrue, or that appellant was entitled to deny entry to law enforcement officers who possessed neither arrest nor search warrants (R. 315, 452-54, 606-07, 647-51). The State was permitted to argue to the jury, over repeated defense objection, that capiases were arrest warrants, that the legality of the capiases

was not in dispute, and that the absence of a search warrant was immaterial to Dr. Pembaur's guilt or innocence (R. 687-88, 690, 691, 692, 708-10).

At the conclusion of the State's case, the defense moved for judgment of acquittal, contending that the State had failed to prove an essential element of the offense charged. Conviction of the offense, defined by Section 2921.31(A) of the Ohio Revised Code, the defense contended, required proof that Dr. Pembaur acted "without privilege to do so" when he refused to open his door to permit a warrantless entry (R. 562). The trial court denied the motion for judgment of acquittal, stating, "that the Court feels that the record contains credible evidence of probative value as to all the elements of the crime charged in the indictment." (R. 569). A motion for judgment of acquittal was again denied at the conclusion of all of the evidence (R. 653, 658).

Dr. Pembaur and several other witnesses testified for the defense. Asked why he refused to open the door to his office, Dr. Pembaur testified:

> "Well, as a physician I have certain obligations in running a medical office. Particularly, I am obligated to protect my patients. I am obligated to protect the confidentiality of the medical records. I am obligated to protect my employees. So I wanted legal advice and I wanted a lawyer to tell me exactly what I am supposed to do." (R. 582.)

On cross-examination, Dr. Pembaur was asked whether he realized that he was "making decisions in defiance of that court order [the capiases]" by refusing to permit the officers through the door from the reception area of the clinic to the patient-work area. Defense counsel objected, contending:

"No decision was made in defiance of that court order. It is not an order to Dr. Pembaur. I object to the question indicating that it is." (R. 600.)

The objection was overruled.

C. Instructions to the Jury

The trial court instructed the jury, over defense objection and pursuant to request by the State (R. 663-64), as follows:

> "An order issued by a court with jurisdiction over the subject matter and the parties must be obeyed by the parties until it is reversed by orderly and proper proceedings." (R. 730.)

Over defense objection, grounded upon the claim that the case did not involve an attempt to serve a search warrant or an arrest warrant (R. 661-62), the trial court instructed the jury that police officers have the right, pursuant to state law, to "break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make such arrest or such search, he is refused admittance." (R. 729).

Announcing that the defense was not abandoning "the legal proposition . . . that a citizen has a right not to submit to an entry into his premises pursuant to the capias for the arrest of a third person" (R. 661), the defense requested an instruction on the theory of the defense (R. 720-21). The request was denied. The defense also requested that the jury be charged:

> "You are instructed that a citizen has a privilege, under the Ohio and the United Constitutions, to refuse to permit law enforcement officials to enter his office or home unless the law enforcement official has legally

obtained a lawful search warrant authorizing the officer to enter upon the citizen's premises." (R. 722.)

That request was also denied.

D. Conviction and Appeals

Dr. Pembaur was convicted of the offense charged in count six of the indictment—a violation of Ohio Rev. Code § 2921.31(A) (App. p. A82). In a separate and subsequent trial, Dr. Pembaur was acquitted of all remaining charges contained in the indictment (App. p. A33).

On appeal, from the conviction, the Hamilton County Court of Appeals, after thorough consideration of the constitutional issues raised, reversed the conviction and ordered Dr. Pembaur discharged (App. p. A38). The court held that Dr. Pembaur's conduct was non-criminal and constitutionally protected:

"[S]ince the officers possessed no valid search warrant, or functional equivalent thereof, and where no exception to its necessity by way of consent or exigent circumstance existed, the third party owner or proprietor of a private office possessed, through the Fourth Amendment, *a constitutional right to refuse entry into the premises* until a valid search warrant was secured. This constitutionally based right to refuse entry is clearly the 'privilege' referred to in the criminal statute the defendant was convicted of breaking." (App. p. A59.)

The court rejected the state's claim that a citizen is powerless to resist even an unconstitutional search by means which might provoke physical confrontation:

"It has been suggested, although not as a material issue in this case, that such right or privilege

> as may be said to exist to resist a warrantless entry may be lost if the privilege is too vigorously asserted. Certainly, the existence of a constitutional right to resist unlawful entry does not carry with it a license to assault or offer violence to the officers attempting the entry—not, at least, so long as courts exist to provide a forum for the resolution of disputed issues. But the question is unnecessary to consider here, since the defendant's resistance, while doubtless irksome and vexatious to the perfectly well-intentioned officers attempting to serve the writs, was entirely passive. One does not interrupt mortal combat to serve tea to one's adversaries." (App. p. A60.)

By decision rendered February 3, 1982, the Supreme Court of Ohio reversed the decision of the Hamilton County Court of Appeals and remanded the case to that court for rehearing. *State v. Pembaur,* 69 Ohio St. 2d 110, 430 N.E.2d 1331 (1982). The court did not reach the merits of the constitutional claims which had been decided by the lower court. Instead, it simply concluded that one member of that court had not been qualified to participate in the decision at the time the decision was rendered (App. pp. A28-A30.)

Upon rehearing, a panel of three judges of another state appellate district, sitting by special assignment to the Hamilton County Court of Appeals, again reversed Dr. Pembaur's conviction. Between the first and the second court of appeals decisions, this Court decided *Steagald v. United States,* 451 U.S. 204 (1981). The court of appeals viewed *Steagald* as controlling, stating:

> "[W]e are compelled to conclude that because the law enforcement officers in this case possessed no valid search warrant and there were no circumstances ob-

viating the warrant requirement, the appellant did have a right to refuse their entry into his office. Accordingly, the appellant's actions were privileged within the meaning of R.C. 2921.31(A) and the trial court erred in not so ruling in considering the appellant's motion to acquit." (App. p. A18.)

On appeal to the Supreme Court of Ohio from its second setback, the State contended that the second court of appeals decision should be reversed even if *Steagald* dictated that a warrantless entry into Dr. Pembaur's office could not be authorized by the capiases in the possession of the officers who demanded entry. The State argued that the act of resisting even an unlawful search was itself unlawful.

The Supreme Court of Ohio, in a decision rendered on February 8, 1984, adopted the State's argument, reversed the decision of the Hamilton County Court of Appeals, and reinstated Dr. Pembaur's conviction. While recognizing that "*Steagald* represents the proposition that absent consent or exigent circumstances, a search warrant must be obtained in order to seek out the subject of an arrest warrant on the property of a third party," (App. p. A4) the court held that Dr. Pembaur "was not privileged to physically impede the deputies in their attempt to locate the subjects of the capiases." (App. p. A6). The broad principle upon which the Court's decision was based was stated as follows:

> "This, of course, is not to hold that law enforcement officials can freely execute capiases and arrest warrants on third-party premises. A warrantless entry, as in this case, may quite possibly result in the exclusion of pertinent incriminating evidence observed in such entry, and the showing of unreasonable conduct

by a law enforcement officer may well provide a privilege to resist the entry by the occupant. Nevertheless, absent bad faith on the part of a law enforcement officer, an occupant of business premises cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances." (App. p. A6.)

REASON FOR GRANTING THE WRIT

THE DECISION OF THE SUPREME COURT OF OHIO, ALLOWING A PHYSICIAN TO BE CONVICTED OF OBSTRUCTING OFFICIAL BUSINESS SOLELY UPON PROOF THAT THE PHYSICIAN RESISTED A WARRANTLESS POLICE ENTRY BY REFUSING TO OPEN A DOOR BETWEEN THE RECEPTION AREA AND THE INNER PORTION OF THE PHYSICIAN'S MEDICAL CLINIC, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OF FEDERAL COURTS OF APPEALS, AND OF OTHER STATE COURTS OF LAST RESORT.

Petitioner, Dr. Bertold J. Pembaur, stands convicted of the offense of Obstructing Official Business—a violation of Section 2921.31 of the Ohio Revised Code. His conviction rests entirely upon proof that he refused to allow deputy sheriffs to make a warrantless entry into private portions of his medical clinic.

Two different panels of the state court of appeals below concluded, unequivocally, that law enforcement officers were not legally empowered, without a warrant, to move from the public reception area of Dr. Pembaur's clinic to the inner portions of the clinic. The officers who sought to enter Dr. Pembaur's clinic had neither

search warrant nor arrest warrant. They acted solely on the basis of capiases which authorized them to bring the individuals named in the capiases before a court for the purpose of allowing those individuals to show cause why they should not be held in contempt for their alleged failure to respond to grand jury subpoenas. Ohio Rev. Code § 2917.21.

The Supreme Court of Ohio acknowledged that a capias authorizing the seizure of an individual does not empower a law enforcement official to invade the private premises of a person not named in the capias. This Court's decision in *Steagald v. United States,* 451 U.S. 204 (1981), compels that decision. Notwithstanding the fact that capiases afforded no authority for a warrantless entry into Dr. Pembaur's medical clinic, the Supreme Court of Ohio concluded that Dr. Pembaur, by refusing to open a door for the purpose of allowing such an entry, committed the crime of Obstructing Official Business (App. pp. A1-A6).

The decision of the Supreme Court of Ohio converts the exercise of a constitutionally protected right into a criminal offense. The decision is in direct conflict with applicable decisions of this Court, decisions of federal courts of appeals, and decisions of other state courts of last resort.

In *District of Columbia v. Little,* 339 U.S. 1 (1949), this Court upheld a decision which reversed the conviction of a woman on charges of obstructing an officer in the performance of his official duties. Conviction had rested solely upon proof that the woman had refused to permit an officer to enter her dwelling for the purpose of conducting a warrantless health inspection. Refusal to permit entry, this Court held, constituted a lawful exercise of the right of privacy guaranteed by the Fourth

Amendment. Exercise of that right, this Court held, may not be converted into a criminal offense. Any other result would substantially erode Fourth Amendment rights by compelling a Draconian choice between surrender by consent, and conviction by resistance. This Court would not permit that choice to be imposed:

> "Had the respondent not objected to the officer's entry of her house without a search warrant, she might thereby have waived her constitutional objections. The right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here."

339 U.S. at 7.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court unequivocally reaffirmed the holding in *District of Columbia v. Little* that the exercise of Fourth Amendment rights may not be made the subject of criminal prosecution. Granting a writ of prohibition to enjoin a criminal prosecution based upon a citizen's refusal to permit a warrantless inspection of his premises, this Court held that a warrantless health inspection constitutes an unreasonable search, that a citizen has "a constitutional right to insist that the inspectors obtain a warrant to search," and that a citizen "may not constitutionally be convicted for refusing to consent to the inspection." 387 U.S. at 540.

The identical result was reached in *See v. City of Seattle*, 387 U.S. 541 (1967), where this Court reversed the conviction of a property owner for refusing to permit a warrantless inspection of a commercial warehouse. In terms plainly applicable to the conviction of Dr. Pembaur, this Court stated:

> "We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure —is applicable in this context, as in others, to business as well as to residential premises. Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse."

387 U.S. at 546.

Here, Dr. Pembaur was convicted of a criminal offense solely because he exercised his constitutional right to resist a warrantless entry upon his property. He exercised that right in a peaceful fashion by simply refusing to open a door which led to the private portion of his clinic. Had he opened that door to permit a warrantless entry, his action might conceivably have constituted a consent which would effect a voluntary forfeiture of Fourth Amendment rights. *District of Columbia v. Little; Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

The Ohio Supreme Court's willingness to characterize as criminal Dr. Pembaur's refusal to allow a warrantless entry into his office is obviously in direct conflict with decisions of this Court. It is equally inconsistent with views expressed by numerous federal courts of appeals.

In *United States v. Prescott,* 581 F.2d 1343 (9th Cir. 1978), for example, the Court of Appeals for the Ninth Circuit reversed a conviction which rested upon proof that the defendant refused to permit a warrantless entry into her home pursuant to the demand of a postal inspector who was looking for the defendant's neighbor. The defendant did not simply refuse to unlock her door; she

also lied to the investigating officer concerning the whereabouts of the person being sought. As in the instant case, defense counsel was not permitted to argue that the defendant was not obliged to consent to the search of her apartment, and that her refusal to do so might not be considered as evidence against her. The court of appeals, after recognizing the presumption that a law enforcement officer has no right to enter a private dwelling without a warrant, concluded:

> "An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. [Citation omitted]. Nor can it be evidence of a crime. *District of Columbia v. Little*, 339 U.S. 1, 7 (1950)."

United States v. Prescott, 581 F.2d at 1350-51.

The position that a citizen may be convicted of obstructing official business upon proof that he refused to submit to a warrantless and unlawful search, adopted by the Supreme Court of Ohio, has been expressly rejected by courts of appeals for the fifth, sixth, and ninth circuits. See, *e.g.*, *United States v. McKinney*, 379 F.2d 259 (6th Cir. 1967); *Sparks v. United States*, 90 F.2d 61 (6th Cir. 1937); *Miller v. United States*, 230 F.2d 486 (5th Cir. 1956); *United States v. Prescott*, *supra*. State courts of last resort agree that the refusal to consent to a warrantless entry is not a sufficient basis for a criminal conviction. See, *e.g.*, *People v. Wetzel*, 11 Cal. 3d 104, 520 P.2d 416, 113 Cal. Rptr. 32 (1974); *Jolliff v.*

State, 215 So. 2d 234 (Miss. 1968); *Vince v. State*, 39 S.E. 435 (Ga. 1901); *State v. Stip*, 246 N.W.2d 897 (S.D. 1976); *State v. Ludlow*, 503 P.2d 1210 (Utah 1972); *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

The decision of the Supreme Court of Ohio has substantially eroded Fourth Amendment rights in the State of Ohio. Unless altered, the rule announced by the court will impose upon all citizens of the State of Ohio a constitutionally impermissible burden. The exercise of Fourth Amendment rights will be available only to citizens willing to pay a very dear price—the substantial possibility of criminal conviction and the attendant risk of incarceration. Alternatively, citizens will be compelled to abdicate the right to be free of warrantless and unreasonable searches. The choice is constitutionally unacceptable. See, *North Carolina v. Pearce*, 396 U.S. 711 (1969); *Griffin v. California*, 380 U.S. 609 (1965).

The only remedy which the Supreme Court of Ohio offers to those subjected to unlawful searches is the possibility of excluding "pertinent incriminating evidence" which may be seized (App. p. A6). By its decision, the court converts the exclusionary rule, originally intended solely as a means of deterring unlawful police action, into the sole remedy available to the victim of an unconstitutional entry and search. This Court has frequently recognized that the purpose of the exclusionary rule is deterrence, not redress. *E.g., Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Janis*, 428 U.S. 433 (1976). This Court has also recognized that the exclusionary rule is a wholly inadequate means of redressing the violation of Fourth Amendment rights. *E.g., Linkletter v. Walker*, 381 U.S. 618, 637 (1965). The rule that a citizen may not be criminally prosecuted for refusing

to consent to a warrantless search, as the United States Court of Appeals for the Ninth Circuit observed, protects lawful conduct. The objective of the rule is not to deter future transgressions:

> "The rule that we announce does not have as its raison d'etre the deterrence of unlawful conduct by law enforcement officers, as does the rule excluding evidence discovered and seized in the course of an unlawful search. Rather, it seeks to protect the exercise of a constitutional right, here the right not to consent to a warrantless entry."

United States v. Prescott, 581 F.2d at 1351.

The absurdity of the decision of the Supreme Court of Ohio is that it would serve to protect only the guilty. Unless the victim of the unlawful entry happened to be in possession of incriminating evidence, he would have no redress. Dr. Pembaur is a member of that class of victims.

The record, in the instant case, is wholly devoid of any evidence that Dr. Pembaur engaged in any conduct which was not protected by the Fourth and Fourteenth Amendments of the Constitution of the United States. To permit conviction to rest upon proof of such conduct constitutes a violation of due process of law. *Thompson v. Louisville*, 362 U.S. 199 (1960); *Jackson v. Virginia*, 443 U.S. 307 (1979).

The privacy of a professional office is, in some respects, more sacred than that of a private dwelling. A physician, for example, must be concerned not only with his own privacy. He must also be concerned with the confidentiality of the patient files in his possession and with the immediate privacy of those whom he treats.

Fully aware of his professional obligations, and sensitive to his rights as a citizen, Dr. Pembaur refused to allow a warrantless invasion of his office. He did not engage in violence. He injured no one. He sought legal advice. He did nothing he was not entitled to do.

The Supreme Court of Ohio, by permitting a conviction to rest upon proof of such behavior, has seriously undermined the right of privacy. It has jeopardized the confidentiality of the relationship between physician and patient. It has disregarded the fundamental rule that criminal convictions may not rest upon proof of constitutionally protected behavior.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of Ohio, to review the final judgment rendered by that Court on February 8, 1984.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 8, 1984)

No. 82-1757

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

[9 Ohio St. 3d 136]

Criminal Law—search and seizure: occupant of business premises cannot obstruct officer in discharging his duty, when; lawfulness of officer's actions irrelevant; R. C. 2921.31 (A) violated, when.

Absent bad faith on the part of a law enforcement officer, an occupant of business premises cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances. (*Columbus v. Fraley*, 41 Ohio St. 2d 173 [70 O.O. 2d 335], followed.)

APPEAL from the Court of Appeals for Hamilton County.

On May 19, 1977, two Hamilton County sheriff's deputies attempted to serve bench warrants, or capiases, upon two employees of the Rockdale Medical Center. The

bench warrants were issued after a hearing in open court. The capiases stated that both parties had been lawfully served with subpoenas to appear before the grand jury, and that each of them had failed to appear. There has been no issue raised to this court as to the validity of the capiases.

The Rockdale Medical Center is a medical clinic operated by defendant, Bertold J. Pembaur, M.D., and is open to the public. The deputies arrived at the medical center during business hours, and the two employees whom they sought were apparently at the center. The officers entered by the front door and went into a general reception room which was also open to the public. After entering the outer office, one deputy sat down in the reception area and the other approached the receptionist, who was in a separate office but visible through a window. The deputy identified himself to the receptionist and stated his business.

The receptionist informed the deputies that they were not permitted to enter the inner office area in order to serve the capiases, and that they should wait for the defendant. Shortly thereafter defendant appeared from somewhere inside the clinic and, with the aid of the receptionist, closed and barred the door leading from the reception area to the inner office. The deputies showed the capiases to defendant and explained their contents. Defendant told the deputies that the papers were illegal and that the judge made a mistake in signing them. Defendant stated that he was going to call the police, as well as his attorney.

Two Cincinnati police officers arrived within several minutes. They tried to explain the nature of the capiases to defendant and his duty to obey them. Defendant continued to contend that the capiases were illegal and asked the officers to wait until his attorney arrived. After several other police officers [137] were on the scene and the

group had waited approximately two hours, the deputies broke through the office door with an axe. Once inside, they were unable to locate either of the individuals named in the bench warrants.

Defendant was charged, along with two other employees, with obstructing official business, pursuant to R. C. 2921.31(A). This charge, count six of the indictment, was severed from the five other charges against defendant. The case was tried to a jury, which returned a verdict of guilty.

The court of appeals reversed defendant's conviction, but this court vacated that decision and ordered a rehearing. See *State v. Pembaur* (1982), 69 Ohio St. 2d 110 [23 O.O. 3d 159]. The court of appeals issued a second decision, again reversing defendant's conviction.

The court of appeals held that defendant was privileged, under R.C. 2921.31 (A), to exclude the deputies from his office, as he was protected against unreasonable searches and seizures by the Fourth Amendment to the United States Constitution. That court noted that an arrest warrant does not give an officer authority to enter the home of a third party, absent consent or exigent circumstances, in order to find the subject of the warrant. *Steagald v. United States* (1981), 451 U.S. 204. The court reasoned that a private office was no different for search warrant purposes than a private home, citing *Mancusi v. DeForte* (1968), 392 U.S. 364. The court concluded that defendant was privileged to exclude the deputies from his office unless and until they obtained a search warrant. That court also found error in the instruction concerning privilege which had been given to the jury.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Simon L. Leis, Jr., prosecuting attorney, *Mr. William E. Breyer*, *Mr. Leonard Kirschner* and *Mr. Bruce S. Garry*, for appellant.

Messerman & Messerman Co., L.P.A., and *Mr. Gerald A. Messerman*, for appellee.

REILLY, J. The key issue presented in this case is whether a person may obstruct a law enforcement officer in the discharge of that officer's duty, when the person believes that the officer's conduct is unlawful. The state contends that this court should hold that a capias or an arrest warrant includes the authority to enter the business premises of a third party when the officer reasonably believes the subject named in the warrant will be found therein. Notwithstanding, it is not necessary to determine the authority conferred by a capias in this appeal, nor to announce the broad rule of law urged by the state.

It is noteworthy that the rationale of the United States Supreme Court in *Steagald, supra*, is equally persuasive concerning the contrast of a private business premises to a private home. *Steagald* addressed the rights of a third party, not named in the arrest warrant, to be free from an unreasonable search and seizure in his home, and held that this right is not accorded adequate protection by the issuance of an arrest warrant for the person named [138] in the warrant. Hence, *Steagald* represents the proposition that, absent consent or exigent circumstances, a search warrant must be obtained in order to seek out the subject of an arrest warrant on the property of a third party.

Nonetheless, this appeal does not involve a conviction based upon the fruits of a warrantless search, such that the legality of the search must be analyzed. Instead, the conviction in question is based upon the conduct of defendant prior to any such search. Therefore, *Steagald* is not controlling in this case.

Defendant was convicted under R. C. 2921.31(A), which reads as follows:

"No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties."

Unquestionably, defendant impeded the deputies in their attempt to execute the capiases. The question, as the court of appeals correctly determined, was whether defendant was privileged to do so.

The crux of this case is the applicability of *Columbus v. Fraley* (1975), 41 Ohio St. 2d 173 [70 O.O. 2d 335]. There we held in the third paragraph of the syllabus that:

"In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances."

In altering the common-law rule granting a person the right to resist an unlawful arrest, the *Fraley* court deemed it preferable, considering the crunch of modern society, to resolve questions concerning the legality of police conduct in the courts through peaceful means rather than on the street in potentially violent confrontation. *Fraley* is determinative in the present case. Although defendant may well successfully challenge the use against him of any evidence obtained by the deputies in their search for defendant's employees, defendant was not privileged to physically impede the deputies in their attempt to locate the subjects of the capiases.

This, of course, is not to hold that law enforcement officials can freely execute capiases and arrest warrants

on third-party premises. A warrantless entry, as in this case, may quite possibly result in the exclusion of pertinent incriminating evidence observed in such entry, and the showing of unreasonable conduct by a law enforcement officer may well provide a privilege to resist the entry by the occupant. Nevertheless, absent bad faith on the part of a law enforcement officer, an occupant of business premises cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances. The facts in this case do not show bad faith on the part of the deputies, or any other circumstances which would provide a privilege on the part of defendant to obstruct the deputies in the discharge of their duties.

[139] While the court of appeals also held that the trial court's instruction on privilege was inadequate and improper, a review of the charge, considering the issue presented by this case, shows that such charge was not erroneous. The term "privilege" is defined by R. C. 2901.01(L), and the instruction which was given quoted the statutory definition. Such instruction was sufficient to allow the jury to determine whether defendant was privileged to act under R. C. 2921.31(A). This is so because *Fraley* stated that the legality of the police action, absent excessive force, is not a factor to consider when determining whether a privilege to resist exists.

For the foregoing reasons, the judgment of the court of appeals is reversed.

Judgment reversed.

CELEBREZZE, C.J., SWEENEY, HOLMES, and C. BROWN, J.J. concur.

LOCHER, J. concurs in judgment only. W. BROWN, J. dissents.

REILLY, J., of the Tenth Appellate District sitting for J. P. CELEBREZZE, J.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO

(Entered November 3, 1982)

No. C-790380

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

BERTOLD J. PEMBAUR,
Defendant-Appellant.

JUDGMENT ENTRY

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are well taken in part for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio be, and the same hereby is, reversed and the appellant is hereby ordered discharged.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellee, by its counsel, excepts.

OPINION OF THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO

(Filed November 3, 1982)

No. C-790380

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

BERTOLD J. PEMBAUR,
Defendant-Appellant.

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

OPINION

CELEBREZZE, *J.*

On June 24, 1972, [sic] the grand jury of Hamilton County charged the defendant-appellant, Dr. Bertold Pembaur, along with three other persons in a multiple count indictment. Count one charged the appellant and Mary Ruth McMahan with theft (R.C. 2913.02). Based upon the same facts underlying the first count, count two charged Pembaur with receiving stolen property (R.C. 2913.51). Count three charged that the appellant had caused a witness, Marjorie McKinley, to commit perjury before the grand jury (R.C. 2923.03). Both the fourth and [2] sixth counts charged the appellant with obstructing of-

ficial business (R.C. 2921.31). Two other individuals, Peggy Sherman and Earlene Thompson, were named as codefendants in the sixth count. Finally, count five charged the appellant with obstructing justice (R.C. 2921.32).

The appellant entered a plea of not guilty to each of the charges. On August 4, 1977, he filed a motion to dismiss the indictment asserting that the grand jury was composed of an insufficient number of jurors, that an unauthorized person appeared before the grand jury thereby rendering its proceedings void, and that the indictment was unconstitutionally vague. An evidentiary hearing was conducted, and the motion was overruled by the trial court.

Upon oral motion by the prosecuting attorney, the trial court agreed to sever count six from the remaining counts and to try count six first. The appellant objected to this procedure and filed a motion to rejoin the counts. On November 16, 1977, he filed a motion to reschedule the trials so as to permit counts one through five to be tried first. Both of these motions were denied and the case proceeded to trial.

At trial, the prosecution sought to prove that the appellant had wrongfully hampered Hamilton County sheriffs in their attempt to serve capiases on two individuals employed by the appellant at his office located in the Rockdale Medical Center in Cincinnati. The capiases had been issued as these employees had failed to obey a summons to testify before the grand jury in a separate case concerning Dr. Pembaur.

Deputy Sheriffs Frank Webb and David Allen testified that on May 19, 1977 at approximately 2:00 p.m., they went to the medical center dressed in civilian clothes and attempted to serve the capiases on Marjorie [3] McKinley, a secretary, and Kevin Maldon, a doctor at the center.

(Tr. 323, 389.) After entering the outer office, Webb sat down in the reception area and Allen went to the window. He stated that he was a policeman, showed his identification, and said that he wanted to see Mrs. McKinley. (Tr. 326-327, 391-392.) He saw a woman fitting McKinley's description get up from her desk and disappear into another room. The woman remaining at the reception window was Pembaur's codefendant, Peggy Sherman. She told Allen that he could not come in and that he would have to wait for the doctor. (Tr. 327, 392.)

At this point, Allen went to the door next to the window to gain admittance to the inner office. Sherman slammed the door closed. The appellant appeared from inside and wedged a board in the door to keep it shut. (Tr. 327, 392.) The sheriffs showed the capias papers to the doctor and explained what they meant. Pembaur told the sheriffs that the papers were illegal and that the judge had made a mistake in signing them. He stated that he was going to call the police as well as his attorney. (Tr. 328-330, 393.)

Within several minutes, two Cincinnati police officers arrived. (Tr. 331, 394.) These officers tried to explain the nature of the capiases to Pembaur as well as his duty to obey. (Tr. 336.) Pembaur continued to assert that the papers were illegal and asked the officers to wait until his attorney arrived. After several other police officers arrived and the group had waited approximately two hours, the deputy sheriffs broke through the office door with an axe. (Tr. 338-342, 396-400.) Once inside, they were unable to locate either of the two individuals named in the capias. (Tr. 342-343, 400.)

[4] Marjorie McKinley testified that she was present in the office when the deputy sheriffs arrived. Pembaur instructed her to stay in his office and to contact his attor-

ney. (Tr. 521-523.) Peggy Sherman later led McKinley up a back stairway and into a hallway. She waited there with Dr. Maldon until the officers left. (Tr. 523-527.)

The appellant admitted blocking the door so that the officers could not come inside the office. However, he stated that he was only attempting to protect his employees; patients and records. (Tr. 582.) During the period that the officers were waiting in the outer office, Pembaur called a number of attorneys in an attempt to get advice as to how to handle the situation. (Tr. 579-580.) He also tried to call two judges of the Common Pleas Court who were involved in other matters pertaining to the appellant's affairs. (Tr. 581.) The appellant was unsuccessful in all these attempts.

On May [sic] 5, 1977, the jury found the appellant to be guilty as charged in the indictment. The appellant thereafter filed a timely notice of appeal to this Court and his conviction was reversed. However, the State of Ohio then obtained a reversal of that judgment as one of the judges concurring in this Court's two-to-one majority decision had resigned before the opinion was released.

Accordingly, this matter is now before us on rehearing and the appellant asserts the following assignments of error for our consideration:

[5] *First Assignment of Error*:

THE TRIAL COURT ERRONEOUSLY DENIED MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE AND AT THE CONCLUSION OF ALL OF THE EVIDENCE (R. 569, 653, 658).

1. Upon Proof Which Consisted Solely of Evidence Demonstrating that Appellant, a Physician, Re-

fused to Allow Deputy Sheriffs to Enter his Office for the Purpose of Serving Capiases on a Secretary and a Physician, After Repeatedly Requesting the Deputies to Wait Until he Contacted his Attorney, the Trial Court Erroneously Concluded that the Evidence was Sufficient to Warrant Conviction on a Charge of Obstructing Official Business.

2. Dr. Pembaur's Refusal to Allow Law Enforcement Officials to Enter his Office for the Purpose of Arresting Employees Solely on the Basis of Capiases which had been Illegally Issued Does Not Constitute the Crime of Obstructing Official Business.

Second Assignment of Error:

THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY IN A MANNER WHICH BARRED A FAIR DETERMINATION OF THE QUESTION OF GUILT OR INNOCENCE (R. 654-59, 719-23, 741, 782).

1. In a Trial on a Charge of Obstructing Official Business in Violation of R.C. 2921.31, a Jury, Upon Request, Must be Properly Instructed Concerning the Term "Privilege" as that Term is Used in R.C. 2921.31, With Specific Reference to the Particular Legal Rights Asserted by the Defendant to Justify his Challenged Conduct.

2. In a Trial on a Charge of Obstructing Official Business, Arising Out of a Physician's Refusal to Admit Deputy Sheriffs Into a Medical Office to Serve Capiases on Two Persons Who Allegedly Failed to Respond to Subpoenas, the Trial Court Erroneously Instructed the Jury that the Physician Was Required to Admit the Deputies Regardless of the Validity of the Capiases.

3. In Charging the Jury on the Definitions of "Reasonable Doubt" and "Proof Beyond a Reasonable Doubt," the Court So Diluted the Standard of Proof Imposed Upon the State as to Deny Appellant Due Process of Law.

[6] *Third Assignment of Error*:

THE TRIAL COURT ERRED IN DENYING A MOTION TO DISMISS THE INDICTMENT (Tr. 303).

1. Upon Proof that the Prosecutor Had Engaged in a Pattern of Conduct Before the Grand Jury Which Eradicated the Necessary Separation Between Prosecutor and Grand Jury, the Indictment Should Have Been Dismissed.

2. The Grand Jury Which Returned the Indictment, Because it Consisted of Only Nine Persons, Was Not Properly Constituted Pursuant to Article I, Section 10, of the Ohio Constitution and R.C. 2939.02.

3. Count VI of the Indictment is Defective on Its Face.

Fourth Assignment of Error:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S DEMAND FOR A JURY OF TWELVE (R. 4, 35).

1. Although the Due Process Clause of the Fourth Amendment Does Not Require that State Juries in Criminal Cases Always Consist of Twelve Persons, the Ohio Constitution, as Interpreted by the Ohio Supreme Court, Does Require Juries of Twelve in Misdemeanor Cases.

Fifth Assignment of Error:

A PERVASIVE DISREGARD OF FAIR PROCEDURES BY THE TRIAL COURT AND THE PROSECUTOR OPERATED TO DENY APPELLANT A FAIR TRIAL (R. 45, 303).

1. The Trial Court Erred in Denying an Application for Reassignment of the Case Where, at the Time the Application Was Filed, the Record Demonstrated that the Trial Judge Was the Third Judge to Whom the Case Had Been Assigned, that Appellant Had Requested Removal of Neither of the Prior Judges, that Neither of the Prior Judges Had Been Properly Removed, and that Neither Had Been Properly Replaced.

[7] 2. In Granting a Motion to Sever the Sixth Count of the Indictment, a Misdemeanor Charge, and Forcing Appellant to Trial on the Sixth Count Over Vigorous Defense Objection, Repeated Defense Requests that the Case Be Reconsolidated for Trial or that the Felony Charges Contained in the Indictment be Tried Before the Sixth Count, the Court Denied Appellant a Fair Trial.

3. The Trial Court Repeatedly Permitted Police Officers to Testify to Legal Conclusions, Allowed the Prosecutor to Support Those Conclusions by Argument Containing Erroneous Statements of the Law, and Persistently Barred Appellant From Producing Qualified Expert Opinion Testimony Concerning the Legal Issues Raised.

4. The Trial Court Erroneously Considered and Denied a Motion to Transfer the Case to the Hamilton County Municipal Court for Trial.

5. During Closing Argument, the Prosecutor Repeatedly Made Inflammatory Arguments and Uttered

Erroneous Statements of Law, All Condoned by the Court, in the Presence of the Jury.

Sixth Assignment of Error:

THE TRIAL COURT ERRONEOUSLY DENIED A MOTION TO SUPPRESS EVIDENCE (R. 303).

1. Upon Evidence Demonstrating a Disregard of Virtually Every Safeguard Designed to Protect Against Unlawful Invasion of a Citizen's Privacy, the Court Denied a Motion to Suppress Evidence.

[8] I.

The appellant was convicted of the offense of obstructing official business. That offense is defined in R.C. 2921.31 as follows:

> (A) No person *without privilege to do so* and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties. (Emphasis added.)

In his first assignment of error, the appellant asserts that the trial court erred in failing to acquit him of this charge. It is his contention that the capiases issued pursuant to R.C. 2317.21[1] and presented by the deputy sher-

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1. R.C. 2317.21 sets forth the procedure for dealing with a witness who fails to obey a subpoena and provides in part:

> When a witness, . . . fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, a writ of attachment, commanding him to arrest and bring the person named in the writ before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. . . .

iffs were insufficient, under both the United States and Ohio Constitutions, to validate a third party search of his office. As such, the appellant contends that his actions in refusing the officers access to his office were "privileged" within the meaning of R.C. 2921.31 and R.C. 2901.01(L).[2] In a related argument, the appellant further asserts that even if such capiases could have been sufficient if properly issued, they were not so in this case as they lacked proof of personal service as required under the Ohio Revised Code.

[9] It is well settled that except in certain clearly defined circumstances, a search of private property without proper consent is unreasonable unless authorized by a valid search warrant. *United States v. Jeffers* (1951), 342 U.S. 48; *Camara v. Municipal Court* (1967), 387 U.S. 523. Warrantless searches and seizures taking place within a private home are presumptively unreasonable. *Coolidge v. New Hampshire* (1971), 403 U.S. 443. Moreover, for purposes of constitutional protection, the individual's private office is treated in a like manner to his home. *Mancusi v. DeForte* (1968), 392 U.S. 364.

In the instant matter, the prosecution did not claim the existence of such exceptional circumstances as to necessitate the warrantless intrusion into the appellant's private office. Rather, the State asserts that the capiases presented by the Hamilton County deputy sheriffs were of the same effect as an arrest warrant and were therefore sufficient to permit the forcible intrusion into and search of Pembaur's office. We do not agree.

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2. R.C. 2901.01(L) defines the term "privilege" as follows:

"Privilege" means an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity.

It is not necessary for us to determine whether the capiases were the functional equivalent of arrest warrants in this case. The United States Supreme Court has already determined that the search of a person's home pursuant to the arrest warrant for another is violative of the Fourth Amendment to the U.S. Constitution in the absence of an actual search warrant. *Steagald v. United States* (1981), 451 U.S. 204. In the case cited, the Court noted that the primary purpose of an arrest warrant is to protect the individual from unreasonable seizures while a search warrant guards the individual's privacy of home and possessions against unjustified intrusions. Accordingly, the Court held that an arrest warrant is inadequate to protect the interests of individuals not named in the warrant and that, in the absence of exigent circumstances, an actual search warrant is required. *Id.* at 212-214.

[10] Based upon the foregoing, we are compelled to conclude that because the law enforcement officers in this case possessed no valid search warrant and there were no circumstances obviating the warrant requirement, the appellant did have a right to refuse their entry into his office. Accordingly, the appellant's actions were privileged within the meaning of R.C. 2921.31(A) and the trial court erred in not so ruling in considering the appellant's motion to acquit.

We finally note the appellant's argument that the capiases themselves were invalid due to lack of personal service upon the witnesses. In light of our conclusions above, it is not necessary to address this question. Whether validly issued or not, the documents were insufficient to authorize the search.

Accordingly, the first assignment of error is well taken.

II.

In the first and second portions of his second assignment of error, the appellant takes issue with the trial court's instructions on the subject of privilege. The pertinent portions of the court's charge are as follows:

> One of the elements which the State of Ohio must prove beyond a reasonable doubt is that the defendants acted as they did without privilege to do so.
>
> Privilege is a term which is defined by statute in Ohio under Revised Code 2901.01, Subsection L, which says, privilege means an immunity or a license or a right conferred by law, or bestowed by express or implied grant, or arising out of status or a position or an office or relationship, or growing out of necessity.
>
> **[11]** Section 2935.12 of the Ohio Revised Code provides as follows: When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officers making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make such arrest or such search, he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.
>
> The power to compel the attendance and testimony of witnesses is an inherent power of the courts.
>
> An order issued by a court with jurisdiction over the subject matter and the parties must be obeyed by the parties until it is reversed by orderly and proper proceedings. (Tr. 729-730.)

It is the appellant's contention that this charge was incomplete and a misstatement of the applicable law.

It is our conclusion that the court's instructions were indeed in error. A mere recitation of the statutory definition of privilege was not sufficient to explain that very material issue. Moreover, the overall charge invited the jury to find the appellant guilty regardless of the nature and validity of the documents presented to him by the Hamilton County deputy sheriffs. In light of our findings in the foregoing assignments of error, this was clearly erroneous.

In the remaining section of his second assignment of error, the appellant asserts that the court erred in its charge on the definition of "reasonable doubt" and "proof beyond a reasonable doubt". The appellant admits that the court's instructions were consistent with the [12] burden of proof set forth in R.C. 2901.05(D),[3] but asserts that the statutory language is an unconstitutional dilution of the standard of proof required by due process. We do not agree for the reason that the Ohio Supreme Court has already addressed this argument and rejected it. *See State v. Nabozny* (1978), 54 Ohio St. 2d 195.

Based upon our discussion of the first and second arguments of this section, we find the second assignment of error to be well taken.

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3. Revised Code 2901.05(D) states as follows:

"Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

III.

In his third assignment of error, the appellant asserts that the trial court erred in denying the motion to dismiss the indictment. It is his contention that the grand jury proceedings were conducted in an irregular fashion and that the indictment was defective.

First, the appellant challenges the conduct of the county prosecutors during the grand jury proceedings. The appellant asserts that the grand jury room is located within the prosecutor's office and that due to this proximity, the jury is not sufficiently independent of the prosecutor. He also asserts that the number of assistant prosecutors appearing before the grand jury was not properly controlled as at least five different prosecutors were in attendance. Finally, the appellant asserts that one of the assistant prosecutors, William Whalen, should have been disqualified from handling this case as he appeared as a [13] witness before the grand jury and was also a party defendant in a pending civil suit earlier filed by the appellant.

Upon review of the record below, we are unable to find merit in any of the above contentions. There is nothing in the record to indicate that the location of the grand jury room, the number of prosecutors appearing before the grand jury, or the fact that Whalen had been civilly sued by the appellant had any impact whatsoever, prejudicial or otherwise, on the outcome of the proceedings below. Moreover, the record demonstrates that Whalen's testimony consisted of simply turning over his investigatory files to the grand jury. Accordingly, this portion of the appellant's assignment of error is without merit.

The appellant next argues that the grand jury was not properly constituted under Article I, Section 10 of the

Ohio Constitution[4] as well as R.C. 2939.02[5] in that it consisted of only nine, rather than fifteen, members.

This argument has been previously considered and rejected by this Court. In the case of *State v. Wilson* (1978), 57 Ohio App. 2d 11, it was determined that since the number of grand jurors does not affect any substantive rights of the accused, R.C. 2939.02 is superseded by **[14]** Crim. R. 6(A), which provides as follows:

> . . . The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

The Courts of Appeals of Hancock and Cuyahoga Counties have concurred in this result. *See State v. Juergens* (1977), 55 Ohio App. 2d 104; *State v. Moore* (Cuyahoga Cty. Ct. App. 1979) No. 38725. Accordingly, we see no merit in this aspect of the appellant's assignment of error.

The appellant's final argument is that the indictment against him was defective in that it ended with the phrase ". . . and against the peace and dignity of the Ohio Revised Code", rather than ". . . and against the peace and dignity of the State of Ohio" as is required under Article IV, Section 20, of the Ohio Constitution. Although this was a defect in the indictment, we note that the appellant failed to bring it to the attention of the trial court in his

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4. Ohio Constitution, Article I, Section 10, provides in part:

> . . . [N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. . . .

5. Revised Code 2939.02 states:

> Grand juries shall consist of fifteen persons, resident electors of the county. . . .

motion to dismiss. Therefore, since the error is nonjurisdictional in nature it is waived. *See* Crim. R. 12(B)(2).

On the basis of the foregoing, the third assignment of error is overruled.

IV.

In his fourth assignment of error the appellant claims that he was denied a fair trial in this case as the jury consisted of eight members rather than twelve. We do not agree.

Criminal Rule 23(B) provides for juries of eight in misdemeanor cases. In the case of *State, ex rel. Columbus v. Boyland* (1979), 58 Ohio St. 2d 490, the Ohio Supreme Court held that this rule does not violate any constitutional prohibitions and is therefore valid.

Accordingly, the assignment of error is overruled.

[15] V.

In his fifth assignment of error, the appellant asserts that the trial court and prosecutor disregarded proper trial procedure in such a manner as to deny him a fair trial. In support of this contention, the appellant raises five separate issues.

First, the appellant asserts that the trial court erred in denying his motion to have this case assigned to a different judge. This case was originally assigned to Judge Nurre and was later transferred to Judge Doan. It finally came to be assigned to Judge Morrissey who presided over it to completion. Until the appellant filed an application to remove Judge Morrissey, written disqualifications of the first two judges and/or written orders reassigning the case were not filed. However, after the appellant's application was filed, *nunc pro tunc* orders were entered.

The appellant asserts that the procedure outlined above violated the Local Rules of Hamilton County[6] and served as a basis for removing Judge Morrissey from the case. We do not agree. Although accomplished by *nunc pro tunc* entries, the record indicates that the case was reassigned in accordance with the applicable local rules. *See State v. Durham* (1976), 49 Ohio App. 2d 231, 234. We find nothing in the record to indicate that the appellant was in any way prejudiced by these events.

The appellant's second contention is that the Court erred in severing count six of the indictment and trying that offense prior **[16]** to the other five counts. Under Crim R. 14,[7] the trial court has discretion to grant separate trials for different counts contained in an indictment. Absent a showing of abuse of discretion and resulting prejudice, the trial court's decision will not be disturbed on appeal. *State v. Torres* (1981), 66 Ohio St. 2d 340; *State v. Perod* (1968), 15 Ohio App. 2d 115.

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6. Hamilton County Local Rule 7(E) provides:

When necessary or proper a judge may disqualify himself from a particular case. In those circumstances, that judge shall inform the Administrative Judge in writing of his disqualification and upon approval of the Administrative Judge, the Court Administrator will reassign the case pursuant to Rule 7(B) and (C) above. The writing will be an official entry.

7. Criminal Rule 14 states, in part:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, information or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

* * * * *

In this case, the sixth count of the indictment was separately tried at the request of the appellant's two co-defendants, Earlene Thompson and Peggy Sherman, who were not named in counts one through five. The record indicates that count six involved a separate factual setting and issues than the remaining counts. Under these circumstances, we cannot say that the court's decision in separating the counts constituted an abuse of discretion.

The appellant's third claim is that the trial court erred in prohibiting him from producing expert testimony on the issue of whether his actions toward the deputy sheriffs were "privileged". The appellant notes that various law enforcement officials testifying for the prosecution were permitted to refer to the capiases as warrants and express their opinion as to their validity.

[17] In light of our findings in the appellant's first and second assignments of error, this claim is without merit. Moreover, any improper statements made by the officers were cured by the trial court's limiting instructions given at the conclusion of the trial. (Tr. 729.)

The appellant further asserts, however, that the prosecutor was permitted to make erroneous statements of the law in the presence of the jury. The appellant notes that the prosecutor repeatedly interrupted the defense counsel's closing argument and interjected comments that arrest warrants were not necessary to validate the search of Dr. Pembaur's office. (Tr. 687-692.) We agree with the appellant that such statements were erroneous and should not have been tolerated by the trial court. *See Turner v. State* (Montgomery Cty. Ct. App. 1932), 21 Ohio Law Abs. 276. However, we further conclude that due to the court's later curative instructions, the appellant's right to a fair trial was not impaired by these comments. *See State v. Hill* (1977), 52 Ohio App. 2d 393.

The appellant's final claim is that the trial court erred in denying his motion to transfer count six, a misdemeanor, to the Municipal Court for trial. A misdemeanor indictment may be transferred to another court only under the circumstances set forth in Crim. R. 21(A):

> *Where an indictment or information charging only misdemeanors* is filed in the court of common pleas, such court may retain the case for trial or the administrative judge may, within fourteen days after the indictment or information is filed with the clerk of the court of common pleas, transfer it to the court from which the bind over to the grand jury was made or to the court of record of the jurisdiction in which venue appears. (Emphasis added.)

[18] Inasmuch as the indictment in this case charged the appellant with both felonies and misdemeanors, the trial court correctly denied the motion to transfer.

On the basis of the foregoing, the fifth assignment of error is overruled.

VI.

In his sixth and final assignment of error, the appellant asserts that the trial court erred in overruling his motion to suppress filed in this case. In his motion, the appellant alleged that his office was illegally searched on April 26, 1977 and in the course thereof, approximately 30,000 patient files were improperly seized.

We note that although the trial court refused to suppress the evidence seized in the search, the prosecutor made no attempt to admit such evidence during the trial which is now before us for review. Accordingly, the appellant was not prejudiced in any way by the court's ruling on the motion to suppress.

The sixth assignment of error is overruled.

CONCLUSION

For the reasons set forth in our discussion in the appellant's first and second assignments of error, the judgment is reversed and the appellant is hereby ordered discharged.

/s/ JAMES P. CELEBREZZE
Judge
(Celebrezze, J., of the Eighth Appellate District, sitting by assignment.)

PATTON, *P. J.*,*
CORRIGAN, *J.*,* concur.

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*John T. Patton, P.J., and John V. Corrigan, J., of the Eighth Appellate District, sitting by assignment.

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 3, 1982)

No. 81-588

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

[69 Ohio St. 2d 110]

Court of Appeals—Judgment vacated, when—Majority necessary for disposition—Constitutional requirement not met.

APPEAL from the Court of Appeals for Hamilton County.

Bertold J. Pembaur, appellee herein, was convicted of the offense of obstructing official business in violation of R. C. 2921.31. The appellee appealed his conviction by timely filing a notice of appeal. On November 12, 1980, the cause was argued before the Court of Appeals, with Judge Gilbert Bettman presiding.

In December 1980, Judge Bettman submitted his resignation from the Court of Appeals, effective January 3, 1981. On December 30, 1980, he was sworn in as a judge of the Court of Common Pleas for a term to commence on January 4, 1981. The vacancy thus created on the Court of

Appeals was filled by the installation of a new judge on January 5, 1981.

On February 18, 1981, the Court of Appeals rendered a split decision purporting to reverse appellee's conviction. The opinion bears a notation that Judge Bettman "concurred in the foregoing decision prior to his resignation from the Court."

The state filed an application for reconsideration asserting that the judgment of reversal was invalid in that Judge Bettman had no legal power to participate in the disposition of the case as he was not a judge of the Court of Appeals on the date the decision and judgment entry was rendered. The application for reconsideration was overruled.

The cause is before this court pursuant to the allowance of a motion for leave to appeal.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Leonard Kirschner, Mr. William E. Breyer* and *Mr. Bruce Garry*, for appellant.

Messerman & Messerman Co., L.P.A., and *Mr. Gerald A. Messerman*, for appellee.

[111] *Per Curiam.* Section 3 of Article IV of the Ohio Constitution provides, in part:

"(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. * * * In districts having additional judges, three judges shall participate in the hearing and disposition of each case. * * *

"* * *

"(B)(3) A majority of the judges hearing the cause shall be necessary to render a judgment. * * *"

Thus, under the Ohio Constitution, a valid judgment of a Court of Appeals must have the concurrence of at least two judges. In the case at bar, this constitutional requirement was not satisfied. Although Judge Bettman may have indicated to his colleagues an opinion that the appellee's conviction should be reversed, on the date of disposition he no longer was a judge of the Court of Appeals and was not qualified to participate in that court's decision. The remaining two judges differed as to the proper disposition of the cause. Cf. *State v. Sioux Falls Brewing Co.* (1894), 5 S.D. 360, 58 N.W. 928.

The constitutional requirement that a majority of the Court of Appeals judges hearing a cause concur in the judgment was not met in this case. Therefore, the judgment of the Court of Appeals is vacated and the cause remanded to that court for a rehearing.

Judgment accordingly.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES, C. BROWN and KRUPANSKY, JJ., concur.

ORDER OF THE SUPREME COURT OF OHIO

(Dated February 3, 1982)

No. 81-588

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

THE STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY

This cause, here on appeal from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is vacated for the reasons stated in the opinion filed herein and cause remanded to that court for a rehearing.

ORDER OF THE SUPREME COURT OF OHIO

(Dated February 3, 1982)

No. 81-588

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

THE STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

MANDATE

To the Honorable Court of Appeals Within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals vacated and cause remanded to that court for a rehearing, for the reasons set forth in the opinion rendered herein.

JUDGMENT OF ACQUITTAL ON VERDICTS, THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

(Filed June 19, 1981)

No. B 771779

COURT OF COMMON PLEAS
THE STATE OF OHIO, HAMILTON COUNTY

THE STATE OF OHIO

vs.

BERTOLD PEMBAUR

JUDGMENT OF ACQUITTAL ON VERDICTS

It appearing to the Court that the Jury having heretofore returned a Verdict finding the Defendant is Not Guilty as charged in the Indictment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Judgment be, and the same is hereby entered in favor of the Defendant.

IT IS FURTHER ORDERED, that the Defendant go hence without day, and recover his Costs herein expended.

DECISION AND ENTRY ON RECONSIDERATION OF THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO

(Filed March 18, 1981)

No. C-790380

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee-Applicant,

vs.

BERTOLD J. PEMBAUR,
Defendant-Appellant-Respondent.

DECISION AND ENTRY ON RECONSIDERATION

This cause came on to be heard on the State's Application to Reconsider the judgment and order journalized in this appeal on February 18, 1981, for the reason that Judge Gilbert Bettman, one of the three judges sitting on the appeal, had resigned from this Court as of January 3, 1981, and was not, the state claims, a judge of this Court entitled to act on the date of journalization.

Being fully informed and after due consideration, the Court finds that the Application to Reconsider is not well taken, first because Judge Gilbert Bettman had the authority and the duty to complete the business of this Court on which he had entered while a member of it despite his intervening resignation, (*State ex rel. Witten v. Ferguson* [1947] 148 Ohio St. 792, 76 N.E.2d 886; *State v. Powers*

[1954] 98 Ohio App. 365, 129 N.E.2d 653) and second because Judge Gilbert Bettman's status as a judge of this Court can be [2] questioned only in a *quo warranto* proceeding in which he is a party (*State v. Staten* [1971] 25 Ohio St. 2d 107, 267 N.E.2d 122; *Stiess v. State* [1921] 103 O.S. 33, 132 N.E. 85), assuming *arguendo* that his status was subject to attack.

Therefore, the Application for Reconsideration is hereby overruled.

BLACK, *P.J.*, and PALMER, *J.*, concur.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO

(Entered February 18, 1981)

No. C-790380

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Appellee,

vs.

BERTOLD J. PEMBAUR,
Appellant.

JUDGMENT ENTRY

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are well taken in part for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio be, and the same hereby is, reversed and the defendant hereby ordered discharged.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellee, by its counsel, excepts.

OPINION OF THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO

(Filed February 18, 1981)

No. C-790380

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

BERTOLD J. PEMBAUR,
Defendant-Appellant.

OPINION

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PALMER, J.

The defendant-appellant, Bertold J. Pembaur, appeals from his conviction by a jury of obstructing official business in violation of R.C. 2921.31.[1] He presents six assignments of error, with multiple issues thereunder.

[2] The threshold, and most complex, question raised by this appeal is whether the defendant, the proprietor of a medical clinic, had a right or privilege to prevent entry into the private portions of that office by deputy sheriffs armed with writs of attachment (sometimes called "capiases" or "bench warrants") to arrest two individuals employed at the Clinic who had failed or refused to appear

as witnesses before the Grand Jury to answer questions about offenses allegedly committed by the defendant. The deputies concededly did not have search warrants complying with the requirements of Crim. R. 41. Dr. Pembaur, the proprietor, claims the right or privilege under the Fourth and Fourteenth Amendments to the United States Constitution and under Section 14, Article I of the Ohio Constitution to resist the entry attempted by the officers. The State, on the contrary, argues that the possession by its officers of the writs of attachment was sufficient to remove the constitutional impediment and, therefore, the privilege to resist entry.

The second assignment of error raises an associated issue, *viz.*, was the foregoing question as to the existence of a constitutional right or privilege to prevent entry a matter of law for the court to decide, or a matter within the province of the jury? If the former, was the defendant prejudiced by the trial court's instructions to the jury concerning the issue of privilege, or was the error harmless beyond a reasonable doubt?

While these first two assignments of error embody, we conclude, the substantial issues raised by this appeal, there are other issues submitted by the defendant which we are required to examine in accordance with App. R. 12(A). These remaining four assignments [3] of error arise, in part, from the following circumstances: the charge of obstructing official business was only one of six counts in the indictment against Dr. Pembaur and others, and it was tried separately over defendant's objection; the trial of the instant misdemeanor charge was before an eight-person jury, and in the Court of Common Pleas, rather than a Municipal Court; the presiding judge was the third one to whom the case had been assigned; and the court refused to suppress certain evidence seized in an extensive

search of Dr. Pembaur's office that occurred some three weeks before the incident which occasioned the charge of obstructing official business other facts necessary to exemplify these secondary assignments of error will be set out separately as the issues are serially considered in the latter sections herein. The facts contained in the record necessary for a proper consideration of the first two assignments of error are set out immediately hereafter.

Facts

At approximately 2:00 p.m. on May 19, 1977, two Hamilton County deputy sheriffs arrived at Dr. Pembaur's Rockdale Medical Clinic in Cincinnati to execute writs of attachment[2] for the arrest of two persons employed at the clinic, one Kevin Maldon, M.D., and one Marjorie McKinley, a secretary. These two individuals had failed to appear as witnesses before the Grand Jury pursuant to subpoenas issued to them for the purpose of securing their testimony in the Grand Jury's investigation of Dr. Pembaur's affairs. The deputies believed that both witnesses were in the Clinic, since that was their known place of work and was during the usual hours of their employment. In addition, the deputies testified that they saw a [4] woman who met the description of Mrs. McKinley seated at a desk behind the receptionist. The two women were stationed behind a sliding glass window separating the waiting room from the working area of the Clinic. The individual meeting the description of Mrs. McKinley subsequently disappeared into the interior of the offices after an apparent consultation with the receptionist.

After the presence and the purposes of the deputies were made known to the receptionist, Dr. Pembaur appeared at the receptionist's station. Following his reading

the two writs, he wedged tight with a piece of wood the single latched door that led from the public reception room to the private working area of the Clinic, refused the deputies attempted entrance, and asked them to leave the premises. His stated reasons were that the writs were illegal, the judges had mistakenly issued them, and the judges had no business signing them. Dr. Pembaur's response to a question by counsel as to why he didn't open the door, was the following:

> A. Well, as a physician I have certain obligations in running a medical office. I am obligated to protect the confidentiality of the medical records. I am obligated to protect my employees. So I wanted legal advice and I wanted a lawyer to tell me exactly what I am supposed to do. (T.p. 582.)

Dr. Pembaur stated that on an earlier occasion he had admitted police into his Clinic when they were armed with a search warrant for his offices. This time, however, the deputies testified that he appeared agitated and stated repeatedly that he was going to call the police. Obviously he did so, for within ten minutes two Cincinnati police officers appeared in response to a burglar alarm activated by Dr. Pembaur. The police officers told the doctor that the capiases were in order and that he should permit entry so that [5] the witnesses could be found and arrested. Dr. Pembaur remained adamant and ordered the officers off the premises.

Meanwhile, the doctor had also called media organizations, and the scene at the Clinic was further complicated by the presence of TV cameras, reporters, newsmen, attorneys, including an assistant prosecuting attorney, and others. The confrontation continued during the next two hours while Dr. Pembaur attempted to reach four or five lawyers and two judges. The law enforcement officers

waited for him to make those contacts, and were invited to listen in to the doctor's calls to them, but continued to insist on the legality of the court orders and their duty to execute them. The doctor, on the other hand, continued to assert the illegality or inappropriateness of the writs. At some point during the debate, Dr. Pembaur offered tea to the officers, who accepted the opportunity to refresh themselves. Finally, at about 4:00 p.m., in the presence of five Cincinnati police officers and the two sheriff's deputies, the ranking police officer advised Dr. Pembaur that force would have to be used to enter the working area. The doctor's response was to direct the two deputies to try to enter, but they could not budge the door with their shoulders. Thereupon, the door was broken down by the police with an axe and sledgehammer obtained from a nearby fire department. The two witnesses had, meanwhile, and with the help of another Clinic employee, secreted themselves in a stairway accessible to the Clinic but not part of it, and were not discovered by the searching officers. Mrs. McKinley was arrested later that evening in her residence. Dr. Maldon was arrested the next day.

[6] *First Assignment of Error*

In this assignment of error, the defendant asserts his constitutional right and privilege, through the Fourth and Fourteenth Amendments of the United States Constitution and through the substantially identical provisions of Section 14, Article I of the Ohio Constitution, to refuse the entry of police into his private offices for the purpose of searching for and seizing third persons for whom writs of attachment or capiases had been issued under state law, arguing that this privilege should have been found to exist as a matter of law, and required the granting of his Crim. R. 29 motion for acquittal at the conclusion of the

State's case and at the conclusion of all of the evidence. The defendant mounts two arguments in support of this proposition: (i) that writs of attachment issued pursuant to R.C. 2317.21, unlike validly issued search warrants, are insufficient to meet Fourth Amendment standards as to third person searches; and (ii) even if such writs or capias warrants would have been sufficient to meet Fourth Amendment criteria, they were not so here because they were illegally issued under Ohio law. The alleged illegality is said to arise because of the failure of return of service of the underlying subpoenas, R.C. 2317.21. Absent personal service of the subpoenas, argues the defendant, the writs of attachment could not lawfully issue. However, the record does not support the defendant's argument of failure of service of the subpoenas and of the consequent illegality of the writs of attachment. We hold, in disposition of the second argument offered in support of the first assignment of error, that the two writs of attachment were in fact lawfully issued, and will accordingly [7] proceed directly to the remaining and principal issue under this assignment of error.

The State responds to the defendant's assertion of privilege under the United States and Ohio Constitutions by arguments which may be reduced to the following proposition of law it would have us adopt: thus, the State argues, police authorities may, without constitutional or other inhibition, and in the absence of either a valid search warrant or exigent circumstances excusing the necessity therefor, make a nonconsensual forcible entry into the home or private place of business of a third person, in order to search for and to seize individuals whom the police have reason to believe are residing or working therein, provided only that the police are forearmed with writs of attachment ("capiases" or "bench warrants" valid

under applicable state law, directing the arrest for contempt of the individual named therein.[3]

Because we find no persuasive decisions or authorities defining, or restricting, Fourth Amendment protections in such terms nor any pressing reason or policy for our initiating such a rule, the majority of this Court disagrees with any such formulation and therefore, disagrees as well with the conclusion drawn by the State from its formulation of the rule, *viz.*, that a third person whose home or private place of business is sought to be entered by police to execute such writs of attachment, is without constitutional privilege to resist entry, and that when such resistance is offered, even though passive and non-violent, such third person may be charged with and convicted of the crime of obstructing official [8] business, and sentenced as a second degree misdemeanant.

Indeed, all authority to which we have been directed or have ourselves discovered, and all reason which we have been able to direct to the point, persuades us that the rule sought by the State was not hitherto the law, nor ought it in our judgment to become the law. The following sections explore in some detail our understanding of the present state of Fourth Amendment law. If we do so at greater length than usual, it is because the principle involved is one of first importance, for we can think of few things more basic to our way of life than the laws which protect and preserve the sanctity of the home and office.

I.

The general rule, as derived from cases examining the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, *Mapp v. Ohio* (1966), 367 U.S. 643, would hold that a police search or seizure of

persons or property within the protection of the Fourth Amendment will not be found unreasonable where it is preceded by and limited to authority granted them under a valid search warrant. *Zurcher v. Stanford Daily* (1978), 436 U.S. 547; *Michigan v. Tyler* (1978), 436 U.S. 499; *Sifuento v. United States* (1976), 428 U.S. 543. Conversely, a warrantless search or seizure, or a search or seizure pursuant to a search or other warrant issued under circumstances failing to conform with the strict requirements established for the issuance of search warrants, *e.g., Spinelli v. United States* (1969), 393 U.S. 410; *United States v. Ventresca* (1965), 380 U.S. 102, will be held unreasonable and unlawful unless **[9]** the police are able to demonstrate one of the carefully defined and limited exceptions to the rule requiring an antecedent search warrant. *E.g., Walter v. United States* (1980), 100 S. Ct. 2395; *Marshall v. Barlow's, Inc.* (1978), 436 U.S. 307; *Lo-Ji Sales, Inc. v. New York* (1979), 442 U.S. 319. *See Harris v. United States* (1968), 390 U.S. 234 (warrantless seizure upheld when article in plain view); *Terry v. Ohio* (1968), 392 U.S. 1 (warrantless search made incident to lawful arrest); *Schneckloth v. Bustamonte* (1973), 412 U.S. 218 (warrantless search upheld where voluntary consent obtained); *Warden v. Hayden* (1967), 387 U.S. 294 (warrantless entry into suspect's home by police in hot pursuit upheld as exigent circumstance). Where, as here, the search and seizure takes place in a home or private office, as opposed to a public room, the city streets, or even an automobile, the general rule may be stated in even more restrictive terms, as in the following statement of the rule by the United States Supreme Court:

> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least

> as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances."
>
> * * * * *
>
> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without a warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

[10] *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 474-475, 477-478 (citations omitted). The reasons for the more stringent expression of the rule when the police entry is into a house or office are well-known and unnecessary to repeat here. See, for example, the detailed provenance of the rule by Mr. Justice Stevens, writing for the majority in *Payton v. New York* (1980), 445 U.S. 573, 591-598, and the analysis of Judge Duniway in *United States v. Prescott* (9th Cir. 1978), 581 F.2d 1343, 1348-1350. For our purposes, suffice it to say that the "exigent circumstances" exceptions have been so "jealously and carefully drawn," *Jones v. United States* (1958), 357 U.S. 493, 499, that there must in every instance be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." *MacDonald v. United States* (1948), 335 U.S. 451, 456. *See United States v. Jeffers* (1951), 342 U.S. 48.

Although not significantly challenged by the parties, (*see* footnote 3, *supra*, and accompanying text), it may

be as well to state the obvious: that, except for the possession by the police of writs of attachment, the instant facts, on their face, bring the appellant well within the foregoing *"per se"* unreasonable rule of *Coolidge, supra.* The entry by the police to seize the persons or individuals named in the writs of attachment was within the scope of Fourth Amendment protection. *Terry, supra; Katz v. United States* (1967), 389 U.S. 347, 351 (". . . the Fourth Amendment protects people, not places."). The forcible entry of the police was into the defendant's private offices, an area not open to the public nor to anyone not expressly invited therein, the equivalent of a private **[11]** home for Fourth Amendment purposes. *Mancusi v. DeForte* (1968), 392 U.S. 364; *See v. City of Seattle* (1967), 387 U.S. 541, 543, citing *Go-Bart Importing Co. v. United States* (1930), 282 U.S. 344 ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."). *See also Combs v. United States* (1972), 408 U.S. 224. The defendant, as the person entitled to exclusive possession of the premises, is the person protected by the Fourth Amendment, and entitled to raise its guaranty against unlawful entry. *Rakas v. Illinois* (1978), 429 U.S. 128; *United States v. Miller* (1976), 425 U.S. 435; *Brown v. United States* (1973), 411 U.S. 223. These are not, therefore, issues that need concern us further.

One additional matter requires examination before proceeding to the principal area of this decision. As noted in the above statements of the general rule, a search or seizure which would otherwise be unreasonable in the absence of a warrant, or in the presence of an insufficient or defective warrant, may be held reasonable if the facts of the case bring it within one of the recognized exceptions

to the rule. Thus, the consent of the individual entitled to the privilege removes the need for further formality. *E.g., Lewis v. United States* (1966), 385 U.S. 206. Other exceptions include searches incident to lawful arrests, seizures upon plain view or in hot pursuit, and a limited search for weapons, under appropriate circumstances, for the protection of the arresting officers. *E.g., Michigan v. Tyler, supra* (seized article in plain view); *Adams v. Williams* (1972), 407 U.S. 143 (limited weapons frisk upon arrest); *Shipley v.* [12] *California* (1969), 395 U.S. 818 (search of suspect's house incident to lawful arrest); *Chapman v. United States* (1961), 365 U.S. 610 (entry during hot pursuit). *See generally United States v. Wright* (6th Cir. 1978), 577 F.2d 378. Most or all of these exceptions, however, have found their way into the law under factual circumstances not involving private homes or offices.

> It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354:
>
> > "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of

> property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer."

Payton, supra at 586-587 (citations omitted). *See also United States v. Watson* (1976), 423 U.S. 411; *Ker v. California* (1963), 374 U.S. 23. In any event, none of the above exceptions are here factually proximate, nor are argued to be so.

The remaining exception, which has been held by a number of courts, although not expressly so by the United States Supreme Court, to be applicable to searches and seizures in homes and offices, is that covered within the exigent circumstances exception. As stated in the majority opinion in *Payton, supra* at 583 **[13]** (emphasis added; citations omitted):

> Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of *emergency or dangerous situation*, described in our cases as "exigent circumstances" that would justify a warrantless entry into a home for the purpose of either arrest or search.

Some of the circumstances held by other authorities to constitute exigent circumstances include the fact that a grave offense has been committed, that the suspect is reasonably believed to be armed, that strong reason exists to believe the person is on the premises and may escape if not quickly caught, and that a magistrate is not readily available to

issue a proper warrant. *Virgin Islands v. Gereau* (3d Cir. 1974), 502 F.2d 914; *Dormon v. United States* (D.C. Cir. 1970), 435 F.2d 385. *See also Mincey v. Arizona* (1978), 437 U.S. 385; *United States v. Renfro* (5th Cir. 1980), 620 F.2d 497; *United States v. Hendrix* (D.C. Cir. 1979), 595 F.2d 83.

It seems to us perfectly clear that none of these exigent circumstances, or any other arguable "emergency or dangerous situation," existed in the present case to make matters exigent. The offense for which the two individuals here were sought was a failure to respond to a subpoena, punishable in contempt and neither felony nor misdemeanor. R.C. 2317.22. It was not suggested that either individual sought under the writs of attachment was armed or dangerous, nor, for that matter, was the defendant. The entire confrontation provoking the charge against the defendant, a two-hour **[14]** melee involving the serving officers, other city police and lawyers called in by the defendant, with newspaper and television reporters all milling about, while the defendant tried to reach a judge to set matters straight, and in the midst of which the defendant offered and the officers accepted tea, might even be thought comic if the implications were not so deadly serious. But in all events, and however one might characterize the episode, it could not conceivably offer an instance of an "emergency or dangerous situation," *Payton, supra*, or of exigent circumstances. *Mincey, supra; Coolidge, supra*. Ample time existed to secure a proper search warrant after the defendant refused entry to the county officers, and if the premises were not sealed off to prevent the escape of either of the two individuals sought to be attached, the fault lay elsewhere than in the circumstances of the case. *MacDonald, supra* at 455 ("No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure

to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement."). *See Johnson v. United States* (1948), 333 U.S. 10.

We conclude, therefore, that since no exception, whether of exigent or other circumstances, existed under the facts of this case which would excuse the general rule that a warrantless search of a home or private office is *per se* unreasonable, the sole remaining question is the following: may the writs of attachment held by the county officers and issued pursuant to R.C. 2317.21,[4] sometimes referred to as "capiases" or "bench warrants," and which we have held were validly issued, be deemed the *functional equivalents* of [15] valid search warrants, so that the forcible entry into the defendant's private office and subsequent search for the persons of the witnesses may not be said to have been unreasonable under the Fourth Amendment? If the answer to this question is in the negative, it seems clear that the privilege of the defendant to resist the demanded entry by refusing the officers admittance, and even placing a bar across the door, as he did, subsisted throughout the confrontation, and no predicate for the crime of obstructing official business was ever laid. *Miller v. United States* (5th Cir. 1956), 230 F.2d 486; *Sparks v. United States* (6th Cir. 1937), 90 F.2d 61; *United States v. Dentice* (E.D. Wis. 1968), 289 F. Supp. 799. *See Bevan v. Krieger* (1933), 289 U.S. 459. The question posed is thus dispositive of the instant issue.

II.

In examining the question of what sort of "warrant" will remove the Fourth Amendment privilege to resist an entry by police, it may be useful to start at the *end* of a long line of cases, rather than at the beginning, by

examining in greater detail the recent decision in *Payton v. New York, supra*. This decision terminated a long-standing disagreement between the various states, and among the several federal circuits, by deciding that the Fourth Amendment prohibits police from making a non-consensual and warrantless entry into a suspect's home in order to make a routine felony arrest. The decision is useful for a variety of reasons in addition to its direct holding, including its historical exegesis of the Amendment, but most notably for purposes of this appeal for what it did *not* hold. The *Payton* majority expressly excluded the direct question presented [16] in this appeal, *i.e.*, the entry into the home of a *third person* to arrest a suspect:

> Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect.

Payton, supra at 583. This reservation is important to bear in mind in view of the Court's comment, in rejecting the State's argument that only a search warrant (which would have been impractical under the circumstances) would serve to protect the privacy of the home:

> We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's *determination of probable cause* between the zealous officer and citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant *founded on*

> *probable cause* implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Id. at 602-603 (emphasis added).

If we assume that the last sentence of the above quoted extract, although *obiter dicta*, is or will be held to be the law under apposite facts, a number of questions would still have to be resolved before it would find its way to any reasonable application in the instant case. For instance: (i) what "probable cause" hearing will be sufficient to found an arrest warrant; will it be found sufficient if it complies with state law; (ii) is a writ of attachment for contempt to be considered the equivalent of an "arrest [17] warrant"; and, most directly, (iii) will the rule proposed in the last sentence of the *Payton* extract quoted above be extended to permit its use as to the homes of *third persons*?

Some indication that the answer to the last question raised by *Payton* will be held to be negative is provided in a post-*Payton* case decided by the United States Court of Appeals for the Fourth Circuit under facts substantially similar to the instant case. In *Wallace v. King* (4th Cir. 1980), 626 F.2d 1157, police officers of Fairfax County, Virginia, armed with a bench warrant for the arrest of an individual for failure to appear in a divorce proceeding, pursued a long-standing policy of the department when they sought to enter the premises of the Wallaces, a residence where the putative contemnor was known to have stayed from time to time. Acting on information supplied by the contemnor's husband, and after observing the contemnor's car parked outside the residence, the police demanded but were refuseld entry into the Wallace home when the police admitted they had no search warrant.

The officers were aware that the arrest warrant arose from a domestic relations matter and had not been advised that the arrest was under urgent or dangerous circumstances, but nevertheless forcibly entered the Wallace home, and, later and under similar circumstances, the home of another third person. The court discussed *Payton*, noted its reservation of the immediate issue, and further noted a non-uniformity of other authority on the issue of third party searches.

> Common to all these opinions, however, is the requirement that, for the search to be constitutionally valid, not only must the officers have probable cause to believe the person named in the arrest warrant is on the premises of the third person, but there must [18] also exist an appropriate exception to the warrant requirement, *e.g.*, consent of the owner or occupier of a dwelling unit or exigent circumstances, which did not exist in this case.
>
> * * * * *
>
> Reasonable or probable cause to believe that a person for whom an arrest warrant has been issued is on the premises, standing alone, is not sufficient. Although *Payton* held that an arrest warrant requires that a suspect "open his doors to the officers of the law," that holding was specifically limited to the "dwelling in which the suspect lives." An arrest warrant indicates only that there is probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in a stranger's house.

Id. at 1161 (citations omitted). Although part of the relief sought in *Wallace* was damages under 42 U.S.C. § 1983, held unavailable where the officers acted in good faith,

the Fourth Circuit held that the trial court should nevertheless have afforded injunctive and declaratory relief. *Id.* To similar effect, in the case of a third party search by FBI agents armed with arrest warrants, is a holding of the United States Court of Appeals for the Third Circuit. In *Virgin Islands v. Gereau* (3d Cir. 1974), 502 F.2d 914, 928, the court observed:

> The Government claims that its entry was lawful because the search was intended to find persons for whom the Government possessed arrest warrants. . . . This Court has made clear, however, that arrest warrants are not substitutes for search warrants. See Fisher v. Volz 496 F.2d 333, 338-343 (3d Cir. 1974). Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects only in exigent circumstances where the police also have probable cause to believe that the suspects may be within.

See also *United States v. Ford* (D.C. Cir. 1977), 533 F.2d 146; *United States v. Cravers* (5th Cir. 1976), 545 F.2d 406; *United* [19] *States v. Brown* (D.C. Cir. 1972), 467 F.2d 419; *United States v. McKinney* (6th Cir. 1967), 379 F.2d 259, for other pre-*Payton* cases.

So far as the majority of this Court is concerned, *Wallace, Virgin Islands* and similar decisions correctly answer the question reserved in *Payton*: that a third party search or seizure will be held to be reasonable only when the police are forearmed with a valid search warrant, and that bench warrants, capiases, writs of attachment, arrest warrants and the like, will not serve as functional equivalents of search warrants.

Our reasons for so concluding the issue are several, but may be stated succinctly as follows: as a result of the

sanctity accorded the home by centuries of common law, and, later, constitutional and statutory enactment, a body of law has arisen creating strict procedural and substantive rules to be observed in the issuance and execution of search warrants necessary to breach the privilege of the home, rules which simply do not exist to restrict the lawful issuance and execution of lesser warrants. To hold all warrants to be fungible or, as the State would have it, to hold a writ of attachment the equivalent of a search warrant for purposes of searching a third party's place of business where the individual is thought to work, seems to us seriously and unjustifiably to denigrate carefully considered safeguards against unreasonable, arbitrary, or ill-considered police actions in a tender area of vital citizen concern.

Thus, the conditions for the issuance of a valid search warrant include, at the outset, the existence of a neutral and **[20]** uninvolved magistrate interposed between the police and the object of the search. *E.g., South Dakota v. Opperman* (1976), 428 U.S. 364; *Gerstein v. Pugh* (1975), 420 U.S. 103; *Coolidge, supra.* It includes the requirement that the magistrate conduct an *ex parte* probable cause hearing, supported by affidavit and/or sworn testimony establishing the factual grounds for issuing the warrant. *E.g., Zurcher, supra; Tyler, supra; Heller v. New York* (1973), 413 U.S. 483; *Shadwick v. City of Tampa* (1972), 407 U.S. 345. If the determination of probable cause is dependent in whole or part upon hearsay information, rigid rules prescribe the adequacy of the hearsay, and how it must be demonstrated. *E.g., Spinelli, supra; Ventresca, supra; Alderman v. United States* (1969), 394 U.S. 165; *Aguillar v. Texas* (1964), 378 U.S. 108. The affidavit for a search warrant must itself name the specific place to be searched, the person or property to be seized, the offense

in relation to the property, and the factual basis for believing that the person or property is located therein. *E.g., Zurcher, supra; Andersen v. Maryland* (1976), 427 U.S. 463; *Stanford v. Texas* (1965), 379 U.S. 476; *Wong Su v. United States* (1963), 371 U.S. 471. These and other requirements for the issuance of search warrants have been codified in this state in Crim. R. 41(A), (B) and (C),[8] which has been held to embody the requirements of the Fourth Amendment that constitute a reasonable search and seizure. *State v. Karr* (1975), 44 Ohio St. 2d 163, 339 N.E.2d 641; *State v. Greene*, No. C-790524, (1st Dist. July 30, 1980); *State v. Porter* (C.P. Franklin County 1977), 53 Ohio Misc. 25, 373 N.E.2d 1296.

Contrast this, then, with the warrants possessed by the officers **[21]** in the instant case, which were issued under the following statutory authority:

> *Attachment of Witness Who Disobeys Subpoena.*
>
> When a witness . . . fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, a writ of attachment, commanding him to arrest and bring the person named in the writ before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. . . .

R.C. 2317.21. It may immediately be seen that scarcely one of the prerequisites for the issuance of a search warrant need be present for the issuance of a valid writ of attachment. There need be no neutral judge or magistrate. Indeed, it does not require a magistrate at all, since a notary public has been held to be an "officer" competent to issue writs of attachment in this state. *In re Bott* (1946), 146 Ohio St. 618, 67 N.E.2d 536; *In Re*

Rauh (1901), 65 Ohio St. 128, 61 N.E. 701; *DeCamp v. Archibald* (1893), 50 Ohio St. 618, 35 N.E. 1056. *See Bevan, supra.* There is no requirement of a probable cause hearing, no requirement of supporting affidavits or sworn testimony, no limitations on hearsay testimony, nor any restrictions on the specificity of the warrant other than that it name the contemnor and fix the time and place of a hearing.

Warrants issued upon probable cause to believe a criminal offense has been committed, as opposed to warrants for contempt, are more carefully controlled, but still fall far short of the requirements for a search warrant. Crim. R. 4. Again, the arrest warrant may issue by an officer less than a magistrate. Crim. R. 4(A). *State v. Fairbanks* (1972), 32 Ohio St. 2d 34, 289 N.E.2d 352. While the issuance must be upon "probable cause," it need not be bottomed **[22]** upon an affidavit or sworn testimony, although the officer may request it. *Id. Cf. United States v. Edwards* (6th Cir. 1973), 474 F.2d 1206, *rev'd. on other grounds,* (1974), 415 U.S. 800. The warrant must name the person and the offense, but need not name the place of execution, Crim. R. 4(C)(1), a critical element for the issuance and execution of a search warrant. *Zurcher, supra.*

It follows, from the foregoing, that it is simply not possible, in this state at least, to hold that writs of attachment ("capiases" or "bench warrants") or, for that matter, warrants of arrest, are adequate substitutes for search warrants. *Payton, supra; Wallace, supra; Virgin Islands, supra.* Their functions are different, and their requirements necessarily reflect the different functions. Writs of attachment and search warrants are not, therefore, functional equivalents. Neither, it should be added, did the procedure actually followed in this case supply the

above noted deficiencies between the two writs, by conforming in actual fact to the requirements of Crim. R. 41; nor do we understand the State to claim otherwise.

We conclude, therefore, that the writs possessed by the officers in question were not sufficient to permit them to make a nonconsensual entry into the private office of the third person, whether or not the officers had probable cause to believe that the individuals named in the writs worked at the office and/or could be found there.

III

The few remaining questions under the first assignment of error are not troublesome. Thus, we hold, consistent with the preceding sections of this decision that since the officers possessed no valid [23] search warrant, or functional equivalent thereof, and where no exception to its necessity by way of consent or exigent circumstance existed, the third party owner or proprietor of a private office possessed, through the Fourth Amendment, *a constitutional right to refuse entry into the premises* until a valid search warrant was secured. This constitutionaally based right to refuse entry is clearly the "privilege" referred to in the criminal statute the defendant was convicted of breaking.

> (A) No person, *without privilege to do so* and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

R.C. 2921.31(A) (emphasis added).

It follows, then, that the existence of the defendant's constitutional privilege, which is a matter of law for the court to determine (*see* discussion under the Second Assignment of Error, *infra*) ought to have been timely decided by the trial court, as a matter of law, and the cause accordingly dismissed by directed verdict at the conclusion of the State's case, or at the latest, at the conclusion of all of the evidence. It is unarguable that where a *privilege* to prevent, obstruct, or delay exists, one cannot be guilty of a crime for exercising the privilege. *United States v. Prescott* (9th Cir. 1978), 581 F.2d 1343; *City of Columbus v. Michel* (10th Dist. 1978), 55 Ohio App. 2d 46, 378 N.E.2d 1077. *See Hendershot v. State* (1886), 44 Ohio St. 208, 6 N.E. 245.

It has been suggested, although not as a material issue in this case, that such right or privilege as may be said to exist to resist a warrantless entry may be lost if the privilege is too vigorously **[24]** asserted. Certainly, the existence of a constitutional right to resist unlawful entry does not carry with it a license to assault or offer violence to the officers attempting the entry—not, at least, so long as courts exist to provide a forum for the resolution of disputed issues. But the question is unnecessary to consider here, since the defendant's resistance, while doubtless irksome and vexatious to the perfectly well-intentioned officers attempting to serve the writs, was entirely passive. One does not interrupt mortal combat to serve tea to one's adversaries. The principle of *Columbus v. Fraley* (1975), 41 Ohio St. 2d 173, 324 N.E.2d 735, cited by the State, is entirely rational and, indeed, the only workable rule in modern society. It is simply inapposite to the instant case, where the place was not *public* but *private*, and where a constitutional privilege to resist obtains and is non-violently asserted by the one entitled to assert it.

Finally, it should be noted that our decision is wholly disassociated from any personal feelings of approval or disapproval of the defendant's actions. The State suggests that the defendant is a scofflaw, a characterization which may or may not be correct. If it is correct, it is irrelevant. The Fourth Amendment exists to protect everyone, saint and sinner alike. Evidence exists to suggest that neither Messrs. Gideon nor Miranda were model citizens; and it is fair to observe that some of the greatest advances in constitutional history were provoked by some of the least admirable among our citizens. The principle of the sanctity of the home, and the rules of law which preserve and protect it, far transcend in importance the interest society has in this defendant, whatever [25] his character may be.

The defendant's first assignment of error is well taken.

Second Assignment of Error

In this assignment, the defendant argues that the trial court prejudicially erred in several respects in its charge to the jury. To the extent that the assignment addresses itself to alleged errors in defining the terms "reasonable doubt" and "proof beyond a reasonable doubt," the argument is without merit. The trial court used the definitions of those terms found in R.C. 2901.05(D), which have been held to be valid and constitutional. *State v. Nabozny* (1978), 54 Ohio St. 2d 195, 575 N.E.2d 784.

In the balance of this assignment of error, the defendant argues that the jury was improperly and incompletely instructed concerning the purport of the term "privilege," the absence of which is a necessary element of the charged offense. Thus, argues the defendant, where the court has the duty to instruct the jury on all matters of law necessary for the information of the jury in giving

its verdict, R.C. 2945.11, it was error to refuse to define the defendant's privilege in constitutional terms, and instead to limit the instructions to the statutory definition contained in R.C. 2921.01(L), citing *City of Cincinnati v. Epperson* (1969), 20 Ohio St. 2d 59, 253 N.E.2d 785. Further, argues the defendant, the trial court erred to his prejudice in gratuitously charging the jury on the rights of police under R.C. 2935.12, and on the general duty to obey court orders.

The entire charge of the trial court pertinent to the issue of privilege was as follows:

> **[26]** One of the elements which the State of Ohio must prove beyond a reasonable doubt is that the defendants acted as they did without privilege to do so.
>
> Privilege is a term which is defined by statute in Ohio under Revised Code 2901.01, Subsection L, which says, privilege means an immunity or a license or a right conferred by law, or bestowed by express or implied grant, or arising out of status or a position or an office or relationship, or growing out of necessity.
>
> Section 2935.12 of the Ohio Revised Code provides as follows: When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officers making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make such arrest or such search, he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.
>
> The power to compel the attendance and testimony of witnesses is an inherent power of the courts.

> An order issued by a court with jurisdiction over the subject matter and the parties must be obeyed by the parties until it is reversed by orderly and proper proceedings. (T.p. 729-730.)

We agree with the defendant that the foregoing instruction was inadequate in part, erroneous in part, and prejudicial *in toto*.

In the first place, the issue of the defendant's constitutional privilege was, like a defendant's Fifth Amendment right against self-incrimination, a matter of law for the court to determine.[6] *E.g., State v. Crawford* (1972), 32 Ohio St. 2d 254, 291 N.E.2d 450; *State v. Wigglesworth* (1969), 18 Ohio St. 2d 171, 248 N.E.2d 607, *rev'd. on other grounds,* (1971), 403 U.S. 947. The court ought to have determined the issue of constitutional privilege in all events no later than the conclusion of all of the evidence, in accordance with the constitutional principles set out under the First Assignment [27] of Error, *supra*. The only role appropriate for the jury would have been in the event of *factual* disputes calling the privilege into question. *Crawford, supra; Wigglesworth, supra*. Thus, for example, if reasonable minds might have disagreed as to whether the inner offices of the Clinic were public or private, or as to whether the defendant gave consent to search, the *factual* issue could have been submitted to the jury with instructions as to the existence of the constitutional privilege under the alternative finds of fact. However, as we have earlier held, no such factual issues here existed; the court had the obligation under the evidence to hold that a privilege to resist entry existed, and to grant the defendant's motion to acquit. *See State v. Goodin* (1978), 56 Ohio St. 2d 438, 384 N.E.2d 290.

But even if a factual dispute *had* existed competent for the jury to consider, the instruction was inadequate. Instead of instructing the jury as to the law appropriate to alternative findings of fact by the jury, the court limited itself to reciting the statutory definition of "privilege" and the rights of police under R.C. 2935.12, neither being wholly appropriate to the issue. The end result was not only to make the jurors the finders of law, but inappropriate and incomplete law as well. *See State v. Grace* (6th Dist. 1976), 50 Ohio App. 2d 259, 362 N.E.2d 1237; *State v. Gettys* (3d Dist. 1976), 49 Ohio App. 2d 241, 360 N.E.2d 735. Moreover, by adding the final two sentences to the charge, as quoted above, the court in effect charged the jury that the defendant had *no* privilege to resist because he was bound to obey a court order to compel the attendance of witnesses. This, as we have seen, is simply not the **[28]** law, and was, in effect, an invitation to find the defendant guilty.

The defendant's second assignment of error is well taken.

Third Assignment of Error

In his third assignment of error, the defendant contends that the trial court committed prejudicial error in refusing to grant his pretrial motion to dismiss the indictment generally on the grounds of prosecutorial misconduct, improprieties in the formation of the Grand Jury and irregularities in the language of the indictment. In the first instance, the defendant asserts that county prosecutors so abused their relationship with the Grand Jury that members of that body were precluded from performing their tasks impartially. Specifically, the defendant challenges the fact that the Grand Jury room is located within the quarters occupied by the prosecutors,

that several prosecutors were often present and that an assistant prosecutor testified before the Grand Jury. The defendant further alleges that the assistant prosecutor in charge of the investigation should have excused himself from further participation in the proceedings after the defendant filed a civil suit against him. Following an evidentiary hearing on the motion to dismiss, the trial court made findings of fact and conclusions of law adverse to the defendant in which the procedures complained of were justified on the grounds that the defendant failed to produce sufficient evidence that the location of the jury room or the number of prosecutors present resulted in any unfair prejudice to the solemn deliberations conducted therein, that the prosecutor did not testify before the grand jury but merely took the stand for the limited purpose of transferring relevant documents to the jury's control at [29] the order of the foreman, and that there was no showing that the civil suit filed by the defendant subsequent to the instigation of the investigation resulted in any prosecutorial vindictiveness. A review of the record in this regard reveals that the trial court's findings were supported by substantial credible evdience of probative value and that its conclusions were appropriate.

Additionally, the defendant argues that the indictment should be dismissed because the Grand Jury was not properly constituted under Section 10, Article I of the Ohio Constitution and R.C. 2939.02, in that it consisted of only nine persons. We decided this issue in *State v. Wilson* (1st Dist. 1978), 57 Ohio App. 2d 11, 384 N.E.2d 1300, wherein we held that the number of jurors on a Grand Jury and the number needed to return an indictment were properly fixed by Crim. R. 6(A) and that R.C. 2939.02 is of no further effect insofar as it conflicts that Rule. *Accord, State v. Juergens* (3d Dist. 1977), 55 Ohio App. 2d 104, 379 N.E.2d 602.

Finally, the defendant contends that the sixth count of the indictment, containing the instant charge for obstruction of justice, was defective because it closed ". . . and against the peace and dignity of the Ohio Revised Code," rather than ". . . and against the peace and dignity of the State of Ohio," as required by Section 20, Article IV of the Ohio Constitution. This irregularity in the language of the indictment obviously arose from a typographical error, because the other five counts were recited properly. Regardless of this fact, however, the claim was not brought to the attention of the trial court at any time in connection with the motion to dismiss. As it is a defect in the indictment [30] other than failure to establish jurisdiction or to charge an offense, it should have been raised prior to trial under Crim. R. 12(B)(2), and failure to do so constitutes a waiver of the issue under Crim. R. 12(G). *State v. Davis*, No. C-75440 (1st Dist. May 24, 1976). Accordingly, the third assignment of error is without merit.

Fourth Assignment of Error

The defendant claims that the court violated his right to a fair trial under the Ohio Constitution in denying his demand for a jury of twelve. We disagree. The trial court properly followed Crim. R. 23(B), setting the number of jurors at eight for the trial of a misdemeanor. It is well-established that in a criminal prosecution, trial by a jury of eight is constitutionally permissible as it does not, in itself, jeopardize the defendant's right to a jury trial under Section 5, Article I of the Ohio Constitution. *State ex rel. Columbus v. Boyland* (1979), 58 Ohio St. 2d 490, 391 N.E.2d 324; *City of Cincinnati v. Lawson*, No. C-75154 (1st Dist. Apr. 5, 1976). *See Ballew v. Georgia* (1978), 435 U.S. 223; *Williams v. Florida* (1970), 399 U.S. 78. Accordingly, the fourth assignment of error is without merit.

Fifth Assignment of Error

In his fifth assignment of error, the defendant asserts that he was denied a fair trial in several respects, an assertion we deem to be, in essence, that his statutory and constitutional rights to due process were violated. The first claim is that this case had been originally assigned to another judge and was improperly and prejudicially reassigned twice, ending up before the judge who [31] presided over the trial of the sixth count. The record discloses written disqualifications of the first and second assigned judges and written orders reassigning the case pursuant to the applicable local court rules. The fact that these rulings are evidenced by *nunc pro tunc* entries is illustrative of administrative inadvertance, not of a violation of the defendant's rights. *State v. Durham* (1st Dist. 1976), 49 Ohio App. 2d 21, 360 N.E.2d 743.

The second claim is that the sixth count should have been reconsolidated with the other five counts so that all would have been tried together. The sixth count had been severed, pursuant to the request of the two co-defendants who were named in that count, in order to simplify the issues for the jury, to avoid prejudicing the co-defendants under the sixth count by trying them in conjunction with the other counts in which they were not charged, to make the trial of this separate incident convenient for witnesses not otherwise involved, and to effect economy of judicial time. Under these circumstances, we find no abuse of discretion in the trial court's refusal to reconsolidate. *Durham, supra; State v. Perod* (11th Dist. 1968), 15 Ohio App. 2d 115, 239 N.E.2d 100. *See State v. Cooper* (1977), 52 Ohio St. 2d 163, 174, 370 N.E.2d 725, 733.

The third claim alleges that while the defendant was barred from producing expert testimony on the legality

of the capiases and their execution, police officers testifying for the prosecution were allowed to give such expert testimony. The claim has no merit because the determination of that legality, as we have seen, was for the court and not the jury, and because the defendant himself elicited the officer's opinions on these points during his cross-examination [32] of them, and because the trial court gave an adequate correcting instruction to the jury in the course of the general instructions at the conclusion of the trial, stating that this testimony should be considered only to establish the fact that such statements were made at the time and place stated. *See State v. Carver* (1972), 30 Ohio St. 2d 280, 285 N.E.2d 26, *cert. denied*, (1973), 409 U.S. 1044.

The fourth claim is that the Common Pleas Court should have transferred the trial of the sixth count to the Hamilton County Municipal Court because it involved only a misdemeanor. Crim. R. 21(A) permits the court to transfer to the Municipal Court for trial a case in which only misdemeanors are charged, but the rule does not allow the transfer of only one count of a multi-count indictment that includes felony charges. As such, we find no error in the court's refusal to transfer the sixth count to the Municipal Court for trial.

The final contention is that the assistant prosecuting attorney was improperly allowed to argue an incorrect statement of law in the presence of the jury. This occurred when the assistant prosecuting attorney repeatedly objected to statements on the law made by defense counsel during his closing argument to the jury. The following colloquy is illustrative:

> Mr. Messerman: There were capiases. There were not arrest warrants, but what that means is that no person was charged with a crime.

Mr. Carr: There will be an objection. There is no requirement whatsoever that an arrest warrant be issued in this situation.

Mr. Messerman: Your Honor, I object to this speech.

[33] Mr. Carr: Would you allow me to finish?

Mr. Messerman: I would ask that you make your speech outside the presence of the jury?

The Court: I will sustain the objection.

Mr. Messerman: Your Honor, the evidence is that there were no arrest warrants.

Mr. Carr: There was no requirement of an arrest warrant.

Mr. Messerman: Your Honor, I object and move that it be stricken and ask for a mistrial.

The Court: It will be denied, Mr. Messerman. Continue with your closing argument.

Mr. Messerman: Your Honor, am I permitted to allude to the fact that there were no arrest warrants?

The Court: You can make—you can refer to it if you like. Then I will give wide latitude to Mr. Carr.

Mr. Messerman: There were no arrest warrants. There were no persons charged with any crime.

Mr. Carr: Judge, I'm going to object, once again. We are not dealing with that situation. We are dealing with a capias for contempt.

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Mr. Messerman: Your Honor, I would respectfully request that if Mr. Carr is going to make objections in which he argues the law that he do so out of the presence of the jury so that the jury might not be misled by his erroneous statement.

Mr. Carr: Judge, I think that is not a misstatement. We have already gone over that.

The Court: All right. Closing arguments are not evidence. I will allow the counsel to comment on the evidence and allow you to comment on it also, Mr. Carr. (T.p. 687-88, 690.)

From the foregoing, and based upon our disposition of the threshold issue in this appeal, it is clear that the assistant prosecuting attorney repeatedly interrupted defense counsel's closing [34] argument with interjections that were incorrect statements of law, and it was error for the trial court to permit them to be made in the presence of the jury. *See Graham v. United States* (6th Cir. 1958), 257 F.2d 724. However, in light of the trial court's limiting instruction at the time and its later curative instruction on this point issued during the general charge to the jury, we cannot say that the error was so prejudicial as to deny the defendant a fair trial. *See State v. Hill* (1st Dist. 1977), 52 Ohio App. 2d 393, 370 N.E.2d 775; *State v. Clark* (8th Dist. 1974), 40 Ohio App. 2d 365, 319 N.E.2d 605.

Accordingly, the fifth assignment of error is without merit.

Sixth Assignment of Error

In the final assignment of error, the defendant asserts that the trial court erred in overruling his motion to suppress. That motion was heard and overruled before

the instant trial on the charge of obstructing official business, and it was directed at the execution of a search warrant carried out about three weeks before the deputies appeared at the doctor's Clinic with the capiases. Although approximately 30,000 files were seized at that time, not one item taken in that episode was introduced or sought to be introduced in the trial *sub judice;* they were used in the investigation of the alleged theft offenses. The defendant is in no position in this trial to raise questions about the issuance and execution of that warrant, however much he may have been aggrieved by the search and seizure. *Waid v. Schaaf* (1934), 127 Ohio St. 274, 188 N.E. 5.

Accordingly, the sixth assignment of error is without merit.

[35] Conclusion

For the foregoing reasons, the judgment of the trial court is reversed and the defendant hereby ordered discharged.

BETTMAN, *P. J.*,* Concurs.
BLACK, *J.*, concurs in part and dissents in part.

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*Bettman, P. J. concurred in the foregoing decision prior to his resignation from the Court.

1. R.C. 2921.31 reads in full as follows:

(A) No person, *without privilege to do so* and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(B) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

(Emphasis added.) The court imposed and then suspended a sentence of ninety days and placed defendant on probation for five years.

2. While the opening recitations in the two writs were, obviously, not identical because the circumstances relating to the witnesses were different, the operative portions of the writs read uniformly as follows:

> IT IS THEREFORE ORDERED, by the Court, that a Capias be issued for the arrest and detention of said witness (name of witness) until further order of this Court.
>
> TO THE SHERIFF OF HAMILTON COUNTY, OHIO:
>
> Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness, (name of witness), whose address is (home address of witness), to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on (him or her) in the within cause.

[36] Dr. Maldon's capias was issued on April 29, 1977. The record suggests that it was sought to be executed on May 19, 1977, at the same time as Mrs. McKinley's capias, which was dated May 19, 1977. The record fails to explain whether any earlier attempts to execute Dr. Maldon's capias were made, and if not, why not. However, this delay in execution is not deemed important by either the prosecutor or the defendant, and we conclude that it is immaterial to the issues in this appeal.

3. There are several other arguments advanced by the State to support the search, but since they are without evidentiary, factual or legal basis, they need not detain us from the principal issue. Thus, the State argues that the Clinic was a "public" place. While the reception room doubtless was, the inner offices clearly were not; and it is the inner offices to which the officers sought and were denied entry.

The State further argues that when the officers saw the witness McKinley behind the reception window glass, "They were entitled to apprehend her" (State's Brief, p. 8), presumably pursuant to some plain view exception. Even if we assume, for the moment, this view of matters to be legally sustainable, it is factually wholly incorrect. The officers testified that they

did not know McKinley by sight, but had a description of her as a ". . . woman, white, female, with dark hair, would have on dark rimmed glasses . . ." (T.p. 325), who would be working at the Clinic. The person they saw was described as having ". . . dark hair and had on thick rimmed glasses, like . . . All we could see of her is just the back of her and the side of her face, this way (indicating)." (T.p. 376.) Indeed, after the officers forced the entry, they exhibited a lady to the assistant prosecutor on the scene who told them it was not Mrs. McKinley (T.p. 349), but a Miss Krause (T.p. 363).

Finally, the State argues that R.C. 2935.12 (allowing officers executing a search warrant, or a warrant for the arrest of a person charged with an offense, to break down a door if refused admittance after announcing his purpose, ". . . but an officer executing a search warrant shall not enter a house or building not described in the warrant") somehow removed the defendant's privilege to resist. The argument is obviously specious. R.C. 2935.12 does not repeal the Fourth Amendment; if a privilege to resist entry exists under the Constitution, the statute does not give the police an excuse to ignore it. The question, and the only real question in this appeal, is whether the writs of attachment effectively removed the Fourth Amendment privilege of the defendant to resist entry, allowing the officers to make a forcible entry.

4. R.C. 2317.21 provides:

When a witness, except a witness who has demanded and [37] has not been paid his traveling fees and fee for one day's attendance when a subpoena is served upon him, as authorized by the provisions of section 2317.18 of the Revised Code, fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, a writ of attachment, commanding him to arrest and bring the person named in the writ before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. If such writ does not require the witness to be immediately brought, he may give bond for a sum fixed by the court of common pleas or the court which issued the subpoena, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum is so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why such writ should not issue against him.

5. Crim. R. 41 provides:

(A) Authority to issue warrant

A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

(B) Property which may be seized with a warrant

A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

(C) Issuance and contents

A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in [38] part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

6. This is not to say that the question of "privilege," as defined in R.C. 2901.01(L), need always be a question of law. It depends on the act of privilege being dealt with and how it called into question. We are dealing here with a *constitutional* privilege arising under the Fourth Amendment, a purely legal question.

BLACK, *J.*, concurring in part and dissenting in part:

I concur with my brothers in their conclusions on the second through the sixth assignments of error, but I dissent from their conclusion that the first assignment of error has merit. Otherwise stated, the only disagreement concerns Dr. Pembaur's claim to a "privilege" to barricade his office against deputies seeking to serve the writs of attachment (capiases) on two of his employees. The correct decision, in my opinion, is that under the very limited circumstances disclosed by the record, the trial court correctly decided that Dr. Pembaur had no "privilege" but then erred in presenting the issue of privilege to the jury for their decision. This error was not harmless beyond a reasonable doubt. The disposition of the case, in my opinion, should be to reverse the judgment [39] below and remand the case for further proceedings.

Dr. Pembaur had no right or privilege to prevent entry of the deputies, because they acted in compliance with the Fourth Amendment limitations on searches and seizures. At common law, a citizen has a right to resist an unlawful arrest or an unlawful search, but he takes his chances on the legality of the arrest or the search. If it is illegal, his right to resist prevails, but if it is legal, his right to resist disappears. *John Bad Elk v. U.S.* (1900), 177 U.S. 529; *U.S. v. Prescott* (9th Cir. 1978), 581 F.2d 1343; *Miller v. U.S.* (5th Cir. 1956), 230 F.2d 486; *Sparks v. U.S.* (6th Cir. 1937), 90 F.2d 61; *U.S. v. Dentice* (E.D. Wis. 1968), 289 F.Supp. 799. Although this right to resist at the scene of an illegal arrest or search has been modified by recent developments in the law in order to remove the place of confrontation from the streets to the courts,[1] I will assume the applicable law is the unmodified common law, giving Dr. Pembaur the broadest privilege.

My conclusions that the search was legal and that Dr. Pembaur had no right to resist arise from the facts peculiar to this case. I would not extrapolate broad rules of police conduct from what I conceive to be a narrow factual base. I agree wholly with the principles of law governing searches and seizures as so ably reviewed by Judge Palmer, but I part company with my brothers in the application of those principles to the facts.

I add the following to the factual background as described above beginning at page 3. At the time the writs of attachment were issued, a grand jury was considering whether there was probable cause to charge Dr. Pembaur with theft offenses in the nature [40] of obtaining property by embezzlement or deception and retaining or disposing of such property (R.C. 2913.02 and 2913.51), in connection with his claims for reimbursement from third party payers for services rendered to indigent patients. Thirty thousand files had been seized from Dr. Pembaur's office under a search warrant. Dr. Kevin Maldon had been personally served with a subpoena in the presence of an assistant county prosecutor, but he had twice refused to appear before the Grand Jury. Mrs. Marjorie McKinley refused to accept service under such circumstances that she is deemed to have been personally served. She was upstairs in bed and refused to get up or otherwise to accept service, communicating with the deputy downstairs through her husband who carried messages back and forth. When the deputy offered to come back at any convenient time the following day, a Sunday, her husband told him he would be wasting his time. She later failed or refused to appear before the grand jury as directed.

The capiases were issued by two different judges. In each instance, the judge was fully informed about ser-

vice of the subpoenas, the refusal or failure of the witnesses to appear and the Grand Jury's need for their testimony. This was done, in each instance, in an open court proceeding that was reduced to a transcript made part of the record in the trial court during which the court was informed by means of representations by assistant county prosecutors who spoke from personal knowledge, representations of the foreman of the Grand Jury speaking from personal knowledge, and the sworn testimony of the deputy who had sought in vain to serve the subpoena on Mrs. McKinley. Promptly after the capias was [41] issued for Mrs. McKinley, the deputies went to Dr. Pembaur's medical office. The record fails to disclose whether the deputies first tried to find the two recalcitrant witnesses at their respective residences, but it is clear that they were both in the medical office during the two-hour confrontation in the waiting room.

The events occurring after the deputies entered the waiting room will not be repeated here. I add, however, that two attorneys were observed by the law enforcement officers inside the medical office towards the end of the two-hour period and before the doors were forcibly opened, from which we may infer that Dr. Pembaur had elicited some response from the phone calls he made to obtain legal advice.

This court is unanimously of the opinion that the writs of attachment were issued on probable cause, and I believe my brothers agree that the deputies had probable cause to believe the two witnesses were in the medical office. This was their known place of work, the time was during normal business hours, and the deputies saw one woman behind the receptionist who met the description of Mrs. McKinley. However, as the majority correctly points out, the record does not present any of the

situations in which a search is valid even though made without a warrant. The record does not disclose consent, hot pursuit, or exigent circumstances.[2]

The question becomes whether the deputies had authority to enter Dr. Pembaur's medical office to seize the witness-contemnor named in the writs in the absence of a search warrant specifically describing the place to be searched. Stated abstractly, the question is whether a sheriff's deputy, armed with a writ of attachment [42] issued by a judge in open court requiring a witness to answer for contempt in failing or refusing to appear before a grand jury investigating crimes allegedly committed at the witness's place of employment, has authority to enter and search that place during business hours, when probable cause exists to believe the witness is therein but there are neither exigent circumstances nor a search warrant specifically describing the place to be searched. In my opinion, the deputies had implied authority to enter and search the place, and they did not have to return either to the issuing judge or to an "independent magistrate" to get a search warrant describing the work place. Dr. Pembaur, therefore, had no right to resist the entry and search.

As noted in the majority opinion, *Payton v. New York* (1980), 445 U.S. 573, holds that a nonconsensual entry into a suspect's home *without a warrant* to make a routine felony arrest is constitutionally unreasonable. In *obiter dicta*, the Supreme Court went on to say that an arrest warrant issued on probable cause implicitly carries with it the limited authority to enter the suspect's dwelling when there is reason to believe he is within. The rationale for this implicit limited authority is that it is reasonable in the constitutional sense to require the arrestee to open his door if the evidence of his participa-

tion in a felony is sufficient to persuade an independent magistrate that his arrest is justified.[3]

I subscribe to this rationale and would extend it to cover the facts before us. The courts issuing the writs of attachment clearly had probable cause to believe these witnesses were in contempt of court, and those witnesses were described in the writ [43] by name and home address.[4] The writs could have been served validly at their home addresses as well as in any public place, by express authority of the writs. I would hold that under the circumstances, they also carried an implicit limited authority to search the witnesses' place of employment, whether owned and controlled by the witnesses or by third persons. It is reasonable to extend the express authority of the writs (to search the contemnor's residence) so that it encompasses a search of his work place, and common sense suggests that it is immaterial whether the place of work is owned or controlled by the defaulting witness. An employer has, by the fact of employment, opened his private premises to certain others. He has breached that pure privacy with which we invest a person's home, and he has reduced his expectations of privacy to a certain degree. I would not equate under the law a family home with a plant employing thousands, for purposes of testing the reasonableness of searches and seizures. I conclude that the third party employer cannot reasonably expect to maintain his privacy inviolate against the deputies duly authorized to serve writs of attachment on defaulting employees whose testimony is required to facilitate a grand jury investigation, especially where the underlying investigation concerns the activities of the employer.

I would limit this decision to its factual base. A writ of attachment is no more an unrestricted hunting license

than is an arrest warrant. They are both subject to Fourth Amendment guarantees against unreasonable searches and seizures. I reject that part of the state's argument in this case that contends mere compliance with R.C. 2317.21 in the issuance of the writs of [44] attachment is equivalent to compliance with the Fourth Amendment. It is not. The court and the police are both subject to constitutional limitations designed to protect individual liberty. Those who have the authority to search and seize or otherwise infringe on citizens' freedom must exercise that authority with a reasonableness that can be rationally articulated and readily understood. As illustrated by Judge Palmer's review of those exceptions to the constitutional guarantees that allow a search and seizure to be made without a warrant, the tests of reasonableness have a significant practical aspect. I would hold the attempted search of Dr. Pembaur's medical office met the constitutional tests.

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1. *Columbus v. Fraley* (1975), 41 Ohio St. 2d 173, 324 N.E.2d 735, holds that in the absence of excessive force by an arresting officer, a private citizen may not forcibly resist his own arrest in a public place by one he knows, or has good reason to believe, is an authorized officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances. *Accord, Wright v. Bailey* (4th Cir. 1976), 544 F.2d 737, *cert. denied* (1977), 434 U.S. 825. Federal courts have held that a citizen may not forcibly resist the search of his own apartment and his own arrest when the officers have both search and arrest warrants; *U.S. v. Ferrone* (3d Cir. 1971), 438 F.2d 381, *cert. denied* (1971), 402 U.S. 1008; and that a citizen may not impede or assist in resisting the arrest of a third person, when the police are not using excessive force, *U.S. v. Vigil* (10th Cir. 1970), 431 F.2d 1037, *cert. denied* (1971), 401 U.S. 918; *U.S. v. Heliczar* (2d Cir. 1967), 373 F.2d 241. Some state courts have also limited the citizen's right to resist. *E.g., State v. Wright* (1968), 1 N.C. App. 479, 162 S.E.2d 56, aff'd. 274 N.C. 380, 163 S.E.2d 897; *People v. Perdew* (1966), 78 Ill. App. 2d 331, 223 N.E.2d 308. See, Note, Defiance of Unlawful Authority, 83 Harv. L. Rev. 626 (1972) Annot. 10 A.L.R. 3d 1146 (1966); Annot., 44 A.L.R. 3d 1078 (1972) §3-§5; Annot. 77 A.L.R. 3d 281 (1977).

2. I would not hold that the plain view doctrine would justify the seizure of Mrs. McKinley under the circumstances. Generally speaking, the doctrine allows an officer who has a right to be [45] where he is, while lawfully searching in connection with another crime or for another purpose or while pursuing lawfully his other duties, to seize items obviously seizable (such as contraband) that inadvertently come into view. *Coolidge v. New Hampshire* (1971), 403 U.S. 443; *Ker v. California* (1963), 374 U.S. 23. A person is entitled to greater protection than a chattel. The doctrine might be said to apply to seizure of persons in public places, and in my opinion, it would apply on the contemnor's own private property but only if the officer is lawfully in a situation where he can make an immediate physical seizure. If he is in a public room while the contemnor is in a protected private area, then I would say he has probable cause to search that place and seize the contemnor, but the question remains unresolved under the plain view doctrine whether he can do so without a search warrant.

3. *Wallace v. King* (4th Cir. 1980), 626 F.2d 1157, pet. cert. filed September 20, 1980, #80-503, was based on *Payton v. New York, supra,* and held that even with a bench warrant for the arrest of a certain woman, the police violated the constitutional rights of her parents when without a search warrant but on probable cause to believe the woman was present as a visitor, they made a nonconsensual entry into the parents' home, there being no showing of exigent circumstances. I distinguish that case from the instant case by the fact that the place searched in *Wallace v. King* was neither the dwelling nor the working place of the arrestee. I would make the same distinction from *Virgin Islands v. Gereau* (3d Cir. 1974), 502 F.2d 914, *cert denied* (1975), 420 U.S. 908.

4. A writ of attachment issued under R.C. 2317.21 may be distinguished from an arrest warrant issued under Ohio practice. The writ in the instant case was issued by a judge in open court with a court reporter present so that we can now review in detail the entire proceeding. The person named is ordered to appear before the court to answer for contempt, an open proceeding. The usual arrest warrant, on the other hand, is issued to facilitate a police investigation prior to the commencement of court proceedings, and while the complainant must sign under oath a complaint or written statement of the alleged crime, what transpires at that time is not, in the great majority of instances, contemporaneously recorded so as to be transcribed and made part of a record subject to review. The point is that in the instant case, we have a full record from which we can determine the legality of the issuance of the writs of attachment and the reasonableness of their attempted execution.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO

(Filed May 14, 1979)

No. B771779

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

THE STATE OF OHIO,

vs.

Berthold J. Pembaur,
Defendant.

JUDGMENT ENTRY: SENTENCE SUSPENDED: PROBATION

Defendant was present in open Court with Counsel, Al Mestemaker and Cal Prem on the 14th day of May 1979 for sentence.

The Court informed the defendant that, the defendant well knew, after trial by Jury, the defendant had been found guilty of the offense(s) of Obstructing Official Business, 2921.31 R.C.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's

own behalf or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Community Correctional Institute for a minimum term of Ninety (90) Days, and costs.

After considering the risk that defendant will commit another offense, the need for protecting the public therefrom, the nature of circumstances of the offense(s), and the defendant's history, character and condition, the Court hereby suspends the execution of said sentence of imprisonment and the defendant is placed on probation for a period of Five (5) Years, on condition that the defendant comply with the general conditions of probation as established by this Court, and further: Defendant to pay a Fine of $750.00, plus Costs plus $150.00 for the probation investigation. Stay of Execution granted until Appeal is heard.

Defendant was notified of the right to appeal as required by Crim. R. 32 (A)(2).

/s/ (MORRISSEY)
Judge

ORDER OF THE SUPREME COURT OF OHIO

(Dated February 8, 1984)

No. 82-1757

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY

This cause, here on appeal from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein.

ORDER OF THE SUPREME COURT OF OHIO

(Dated February 8, 1984)

No. 82-1757

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

MANDATE

To the Honorable Court of Common Pleas Within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed for the reasons set forth in the opinion rendered herein.

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